CONTENTS.

STATEMENT OF THE CASE.

	Page.
Introduction	2
The Petition	6–14
The Answers and Demurrer	15
The Amendment to the Petition	16
Joinder of Issue	17
Motions to Suppress Testimony and Dismiss the Petition	17
The Decision of the Circuit Court	17–19
Assignment of Errors	20

THE FACTS ESTABLISHED.

The Anthracite Deposits	21–22
Transportation Outlets from the Anthracite Fields	23–24
Geographical Distribution of the Anthracite Output	25
The Proprietors of the Anthracite Supply	26–30
The Producers and Sellers of Anthracite	31–33
Relations between Coal Owning and Producing Companies and the Railroads	34–47
(a) Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company	34–39
(b) The Central Railroad Company of New Jersey, The Lehigh Coal & Navigation Company, and The Lehigh & Wilkes-Barre Coal Company	40
(c) The Delaware, Lackawanna & Western Railroad Company	40
(d) The Lehigh Valley Railroad Company, The Lehigh Valley Coal Company, Coxe Brothers & Company (Inc.), New York & Middle Coal Field Railroad & Coal Company, and the Locust Mountain Coal & Iron Company	40–42
(e) Erie Railroad Company, Hillside Coal & Iron Company, and The Pennsylvania Coal Company	43
(f) The New York, Susquehanna & Western Railroad Company and The New York, Susquehanna & Western Coal Company	44
(g) The Temple Iron Company	44
(h) The Delaware & Hudson Company, Hudson Coal Company, and Northern Coal & Iron Company	45
(i) Pennsylvania Railroad Company, Susquehanna Coal Company, Summit Branch Coal Company, Mineral Railroad & Mining Company, Lytle Coal Company, and Lykens Valley Coal Company	46
(j) New York, Ontario & Western Railway Company, Scranton Coal Company, and Elk Hill Coal & Iron Company	47
The Independent Producers	47
Proportion of Shipments by Railroad Coal Companies	47–49
The Position of New York Harbor in the Anthracite Trade	50–53
The Combinations of 1876–1879 and herein of the Origin of the Bureau of Anthracite Coal Statistics	53–57
The Combinations of 1884–1887	57

Page.

THE COMBINATION OF 1892 BETWEEN THE PHILADELPHIA & READING RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, AND LEHIGH VALLEY RAILROAD COMPANY, AND THEIR COAL MINING COMPANIES 58

THE POOLING COMPACT OF 1896 59-60

THE 65 PER CENT CONTRACTS AND THEIR FORERUNNERS 61-75

THE ACQUISITION BY READING COMPANY OF A MAJORITY OF THE SHARES OF THE CENTRAL RAILROAD OF NEW JERSEY 76-85

THE ACQUISITION BY ERIE RAILROAD COMPANY OF A MAJORITY OF THE SHARES OF THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY 86-92

THE ACQUISITION OF THE TEMPLE IRON COMPANY BY THE DEFENDANT RAILROADS AND HEREIN OF THE DEFEAT OF THE PROJECTED NEW YORK, WYOMING & WESTERN RAILROAD 92-109

THE ACQUISITION OF THE PENNSYLVANIA COAL COMPANY BY THE ERIE RAILROAD COMPANY AND HEREIN OF THE DEFEAT OF THE PROJECTED DELAWARE VALLEY & KINGSTON RAILROAD 110-114

THE ABSORPTION IN RECENT YEARS BY LEHIGH VALLEY RAILROAD COMPANY OF INDEPENDENT COAL PRODUCERS ALONG ITS LINE, CULMINATING WITH THE ACQUISITION OF COXE BROTHERS & COMPANY (INC.) AND THE DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD 115-117

THE PURCHASE OF SHARES OF THE LEHIGH VALLEY RAILROAD BY THE OTHER DEFENDANT RAILROADS IN COMBINATION 117-119

FIXING THE PRICE IN 1902 119-123

THE PROFIT IN MINING ANTHRACITE COAL 123-136

THE PROFIT IN TRANSPORTING ANTHRACITE COAL 137-144

THE ARGUMENT.

I. THE INTERESTS OF DEFENDANT RAILROADS IN THE SHARES OF COAL-OWNING AND PRODUCING COMPANIES AND IN ANTHRACITE COAL LANDS ACQUIRED SINCE JANUARY 1, 1874, ARE HELD IN VIOLATION OF THE CONSTITUTION OF PENNSYLVANIA 145-159

II. RAILROADS ENGAGED AS DEFENDANTS ARE IN TRANSPORTING COALS OF THE SAME KIND FROM A SOLE AND RESTRICTED AREA OF PRODUCTION TO THE PRINCIPAL MARKET ARE COMPETITIVE, ALTHOUGH THEIR TRACKS MAY NOT REACH THE SAME MINES 160-170

III. ALL THE DEFENDANTS ARE ENGAGED IN A COMBINATION OF GENERAL SCOPE (REFERRED TO IN THE RECORD AS THE GENERAL COMBINATION) BY WHICH DEFENDANT READING COMPANY AND DEFENDANT RAILROADS AND THEIR AFFILIATED COAL COMPANIES CONTROL, RESTRAIN, AND MONOPOLIZE THE PRODUCTION, TRANSPORTATION, AND SALE OF ANTHRACITE COAL AMONG THE STATES, AND DOMINATE THE INDUSTRY, IN VIOLATION OF THE ACT OF JULY 2, 1890 171-206

(1) The purpose to combine long entertained by defendant railroads and their affiliated coal companies as gathered from previous recurring attempts 174-177

(2) The association since 1899 of defendant railroads and their affiliated coal companies in The Temple Iron Company 177-188

III—Continued. Page.
(3) The association of defendant railroads, their affiliated coal companies, and the other defendants in the system of identical contracts known in the record as 65 per cent contracts..... 188–195
(4) The use by defendant railroads and their affiliated coal companies of the Bureau of Anthracite Coal Statistics as an instrument to suppress competition..... 196–199
(5) The increase of prices in 1902 and the maintenance thereof at the higher level by the affiliated coal companies of defendant railroads acting in concert.... 199–204
(6) An increase in the price of anthracite since 1898 out of all proportion to the increase in the cost of production. 204–205
(7) The acquisition in 1901 by several of the defendant railroads in unison of shares of one of their own number and a competitor, Lehigh Valley Railroad Company, and their continued association as shareholders of such company until after the petition was filed.. 205–206
IV. The 65 Per Cent Contracts, whether Considered as Parts of a Plan or Singly, Restrain and Monopolize Trade and Commerce among the States in Anthracite Coal, in Violation of the Act of July 2, 1890..... 206–259
(1) They restrain and monopolize trade..... 212–236
(2) The trade so affected is interstate..... 237–249
(3) The grounds on which they are defended considered. 249–259
V. The Control, through Stock Ownership, by Reading Company, a Holding Corporation, of Philadelphia & Reading Railway Company and the Central Railroad Company of New Jersey, Competitive Interstate Carriers, and also of the Philadelphia & Reading Coal & Iron Company and the Lehigh & Wilkes-Barre Coal Company, Competitive Producers and Interstate Traders, Constitutes a Combination in Restraint of Trade and a Monopolization thereof, in Violation of Sections 1 and 2 of the Act of July 2, 1890..... 260–312
(A) Philadelphia & Reading Railway Company and the Central Railroad Company of New Jersey operate competitive lines from the sole area of production of anthracite across the States of Pennsylvania and New Jersey to tidewater at New York Harbor—the greatest market—and together transport 33 per cent of the total output moving from the mines..... 265–273
(B) The Philadelphia & Reading Coal & Iron Company and The Lehigh & Wilkes-Barre Coal Company are competitive owners, producers, buyers, and sellers of anthracite in interstate commerce, together owning or controlling 63 per cent of the entire deposits and marketing 25 per cent of the annual supply—29 per cent including the sales of a company affiliated with the Lehigh & Wilkes-Barre..... 274–275
(C) A combination in any form which destroys competition between two such carriers and two such owners, producers, buyers, and sellers of a staple article of commerce, "not as a result of normal methods of business development," restrains and monopolizes trade and commerce among the States in violation of the act of July 2, 1890..... 275–310

Page.

VI. The Control, Through Stock Ownership, by Erie Railroad Company of the New York, Susquehanna & Western Railroad Company, a Competitive Interstate Line, Constitutes a Combination in Restraint of Trade and a Monopolization thereof, in Violation of Sections 1 and 2 of the Act of July 2, 1890..... 312-327

VII. The Combination of Defendants Railroads and Affiliated Coal Companies in the Temple Iron Company, with the Purpose and Effect of Forestalling the Construction of a Projected Competitive Line and Permanently Shutting Out Competition Amongst Such Railroads, and also Amongst their Coal Companies, Restrains and Monopolizes Trade and Commerce Among the States, in Violation of Sections 1 and 2 of the Act of July 2, 1890..... 328-344

VIII. The Acquisition and Continued Holding by Erie Railroad Company of the Entire Capital Stocks of the Pennsylvania Coal Company, Delaware Valley & Kingston Railroad Company, and Erie & Wyoming Valley Railroad Company Restrains and Monopolizes Trade and Commerce Among the States, in Violation of the Act of July 2, 1890..... 345-358

IX. The Acquisition and Control by Lehigh Valley Railroad Company (Directly or Through its Subsidary, the Lehigh Valley Coal Company) of Connell Coal Company, Seneca Coal Company, Warrior Run Coal Company, Wyoming Coal & Land Company, Righter Coal Company, Coxe Brothers & Company, Producers and Shippers Tributary to its Line, and of Delaware, Susquehanna & Schuylkill Railroad Company, Constitute Acts in Aid of the Object of the General Combination of Defendants to Control and Monopolize the Anthracite Coal Trade, and as Such are Violative of the Act of Congress..... 358-360

X. The Objection of Multifariousness Will Not be Considered by this Court..... 361-364

XI. The Admissibility of the Evidence Objected to by Defendants is not Before this Court for Decision. But the Evidence was Competent..... 364-367

1. The deposition in a former case of Alfred Walter, deceased..... 364-365
2. Testimony of John B. Kerr respecting the Temple Iron Company..... 365-366
3. The deposition of Joseph S. Harris in a former case..... 366
4. The compilations of freight rates on anthracite and bituminous coal..... 367

XII. Outline of the Relief Sought in this Court..... 367-371

Appendix A..... 372-401

Appendix B..... 402-403

Appendix C..... 404-405

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, APPELLANT, v. READING COMPANY ET AL. — No. 477.

THE TEMPLE IRON COMPANY, APPELLANT, v. THE UNITED STATES. — No. 485.

READING COMPANY ET AL., APPELLANTS, v. THE UNITED STATES. — No. 504.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

Arrangement.—This brief is divided into three principal parts: Statement of the Case—The Facts Established—The Argument. And under each of these, indicated by appropriate headlines, we have endeavored to assemble what may be especially profitable for the consideration of the Court. The table of contents (*ante*) discloses the complete outline; and the points of the argument are fully set out therein.

STATEMENT OF THE CASE.

INTRODUCTION.

These are cross appeals from the United States Circuit Court, Eastern District of Pennsylvania, in a proceeding brought by the United States to prevent and restrain violations of Sections 1 and 2 of the Act of Congress approved July 2, 1890 (26 Stat., 209), known as the Antitrust Act.

The defendants are:

Reading Company, a holding corporation of Pennsylvania;

Philadelphia & Reading Railway Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, corporations of Pennsylvania, The Central Railroad Company of New Jersey, a corporation of New Jersey, Erie Railroad Company, a corporation of New York, and The New York, Susquehanna & Western Railroad Company, a corporation of Pennsylvania and New Jersey, which transport 77 per cent of the anthracite coal moving from the mines;

Their affiliated coal companies, The Philadelphia & Reading Coal & Iron Company, The Lehigh Valley Coal Company, The Lehigh & Wilkes-Barre Coal Company, The Pennsylvania Coal Company, Hillside Coal & Iron Company, The New York, Susquehanna & Western Coal Company, and The Temple Iron Company, corporations of Pennsylvania, which (together with the defendant Delaware, Lackawanna & Western Railroad, which is both railroad and coal company) control over 87 per cent of all the anthracite coal in the ground and produce approximately 55 per cent

and market approximately 64 per cent of the annual supply;

And 24 corporations of Pennsylvania, 2 partnership associations of Pennsylvania, 4 firms, and 2 individuals, who are alleged to have entered into contracts through which the output of mines operated by them is controlled by the beforementioned defendant railroads and their affiliated coal companies.

The remaining defendants, The Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation of Pennsylvania, and The Mercantile Trust Company, a corporation of New York, were made such because they are trustees in mortgages of certain shares of stock the acquisition of which by the beneficial owners the petition asks to be adjudged unlawful.

The pertinent sections of the Act are:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> SEC. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign

THE PETITION.

The petition, filed June 12, 1907, avers that Reading Company is a holding corporation owning the entire capital stocks of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company; that Philadelphia & Reading Railway Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Central Railroad Company of New Jersey, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company are common carrier corporations, transporting about 80 per cent of the anthracite coal shipped to market, and controlling all the means of transportation serving the anthracite fields save railroads of the Pennsylvania Railroad Company, the New York, Ontario & Western Railway Company, and The Delaware & Hudson Company, which reach but a limited number of mines, and all the means of transportation between those fields and tidewater markets save the said railroads of the Pennsylvania and the New York, Ontario & Western, and are competitors of each other, under natural conditions, in the transportation of anthracite coal from the mines to tidewater outlets. (Pet., pars. I, II; 1 R., 12, 13.)

That The Philadelphia & Reading Coal & Iron Company, The Lehigh Valley Coal Company, The Lehigh & Wilkes-Barre Coal Company, The Pennsylvania Coal Company, Hillside Coal & Iron Company, The New York, Susquehanna & Western Coal Company, and The Temple Iron Company are corporations of Pennsylvania possessing anthracite coal lands and mining and buying anthracite coal and sell-

ing it in the markets of the several States; that all the capital stock of The Philadelphia & Reading Coal & Iron Company is owned by Reading Company, all that of The Lehigh Valley Coal Company by Lehigh Valley Railroad Company, nine-tenths of that of The Lehigh & Wilkes-Barre Coal Company by The Central Railroad Company of New Jersey, all that of The Pennsylvania Coal Company and most [the proof shows all] of that of Hillside Coal & Iron Company by Erie Railroad Company, most of that of The New York, Susquehanna & Western Coal Company by The New York, Susquehanna & Western Railroad Company, and all that of The Temple Iron Company by Reading Company and these railroad companies in stated proportions. (Pet., pars. I, III; 1 R., 12, 14.)

That The Delaware, Lackawanna & Western Railroad Company, in addition to being a common carrier, owns anthracite lands and mines and buys anthracite which it sells in the markets of the several States; that the other defendant railroads are without power, under the Constitution and laws of Pennsylvania, to operate coal mines or to deal in coal, but do so through the coal companies whose shares they severally own. (Pet., par. III; 1 R., 14.)

The petition then alleges that anthracite coal is an article of prime necessity, widely used throughout the United States; that New York Harbor is the greatest market for it; and that the sole deposits, save a few small beds of inferior quality, are found in the State of Pennsylvania, covering an area of only about 484 square miles, divided, for trade purposes, into three "regions," namely, the Wyoming (sometimes called the Lackawanna), the Lehigh, and the

Schuylkill, and for geologic purposes into four "fields" or "basins," namely, the Northern, the Eastern Middle, the Western Middle, and the Southern, the Wyoming region embracing the Northern field, the Lehigh region the Eastern Middle field, and the Southern field east of Tamaqua, and the Schuylkill region the Western Middle field and the Southern field west of Tamaqua. (Pet., pars. IV, V; 1 R., 15, 16.)

Continuing, it alleges that the defendant Reading Company and the defendant railroads, either directly or through their beforementioned subsidiary coal companies, own or otherwise control 90 per cent of the estimated unmined deposits of anthracite coal, distributed as follows:

	Per cent.
Reading Company	44.00
Lehigh Valley Railroad Company	16.87
The Delaware, Lackawanna & Western Railroad Company	6.55
The Central Railroad Company of New Jersey	19.00
Erie Railroad Company	2.59
The New York, Susquehanna & Western Railroad Company	.54
	89.55

and produce, either directly or through such coal companies, from 70 to 75 per cent, approximately, of the annual supply; and that independent operators, meaning those other than the railroads and the railroad coal companies, produce, approximately, from 20 to 25 per cent of the annual supply, which would be sold in the markets of the several States in competition with the output of defendant railroads or their subsidiary coal companies but for the unlawful contracts and combinations complained of. (Pet., par. IV; 1 R., 15.)

Proceeding further it avers that in 1892 The Philadelphia & Reading Railroad Company (predecessor

of Philadelphia & Reading Railway Company), The Central Railroad Company of New Jersey, and Lehigh Valley Railroad Company, owning or controlling about 80 per cent of the unmined anthracite deposits and transporting about 50 per cent of the total anthracite tonnage, were formed into a combination by means of leases under which all the railroads and coal properties of The Central Railroad Company of New Jersey and of Lehigh Valley Railroad Company passed to the control of The Philadelphia & Reading Railroad Company for 999 years; that this combination had effected a material increase in the price of coal when it was pronounced illegal and dissolved by the courts of New Jersey (*Stockton, Attorney-General* v. *Central R. R. Co.*, 50 N. J. Eq. 52); and that subsequently the price of coal declined under the influence of renewed competition. (Pet., par. VI; 1 R., 16, 17.)

Then comes the charge, that some time subsequent to the dissolution of the combination of 1892 defendant Reading Company and defendant railroads and their affiliated defendant coal companies, owning or controlling 90 per cent, more or less, of the entire anthracite deposits, and producing 75 per cent, more or less, of the annual supply, and controlling all the means of transportation between the anthracite mines and tidewater save the lines of the Pennsylvania Railroad and the New York, Ontario & Western Railway—

> entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not

only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other States and its price and sale throughout the several States, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced (Pet., par. VII; 1 R., 17);

and that as steps in the development thereof the said defendants, all of them in some instances, and particular groups in others, engaged in the following-described acts, among others, each in violation of the Act of Congress not alone because of its relation to the General Combination *but equally because in itself a restraint upon trade and commerce among the States*, viz:

(*a*) Defendant railroads agreed amongst themselves upon a uniform contract, known as the 65 per cent contract, a specimen of which is annexed to the petition as Exhibit A, to be entered into by them or their coal companies with the independent operators along their respective lines, under which the railroads would be able to control absolutely the production and sale of the output from the independent mines; and that by virtue of their control of all the means of transportation from the anthracite mines to tidewater, except the lines of the Pennsylvania Railroad and the New York, Ontario & Western Railway, and in effect by transporting at less than published rates coal delivered thereunder, defendant railroads were able to draw a great majority of the independent operators along their lines into making these contracts. (Pet., par. VIIa; 1 R., 17–19.)

(*b*) In 1898 defendants Erie Railroad Company and The New York, Susquehanna & Western Railroad Company, operating competitive railroads from the anthracite fields to tidewater at New York Harbor, together with their respective subsidiary coal companies, were formed into a combination, and the business formerly done by them as competitors monopolized, through the acquisition by Erie Railroad Company, in exchange for its own shares, of a large majority of those of The New York, Susquehanna & Western Railroad Company. (Pet., par. VIIb, 1 R., 19, 20.)

(*c*) In January, 1901, defendants Philadelphia & Reading Railway Company and The Central Railroad Company of New Jersey, operating competitive railroads from the anthracite fields to tidewater at New York Harbor and transporting about 35 per cent of the anthracite shipped to market, and the respective coal companies united in ownership with them, The Philadelphia & Reading Coal & Iron Company and The Lehigh & Wilkes-Barre Coal Company, owning or controlling about 63 per cent of the entire anthracite deposits, were formed into a combination, and the business formerly done by them as competitors monopolized, through the acquisition by defendant Reading Company, which already held all the shares of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company, of a majority of those of The Central Railroad Company of New Jersey. (Pet., par. VIIc, 1 R., 20, 21.)

(*d*) Having been long dissatisfied with the excessive freight rates and discriminatory practices in the transportation of anthracite, in 1898 a large

number of independent operators in the Wyoming and Lehigh regions, chief among them Simpson and Watkins, a firm owning eight collieries with an annual output near 1,500,000 tons, projected a new railroad from the coal regions to tidewater, which would have introduced competition into the transportation of anthracite and at the same time permitted the independent output, theretofore at the mercy of railroads themselves in the coal business, to be sold in the markets in competition with that of the railroad coal companies; and to that end the said independent operators organized, under the laws of Pennsylvania, New York, Wyoming & Western Railroad Company, which had secured pledges of tonnage, had had surveys of its proposed line made, and had purchased several thousand tons of rails, when the defendants Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, conspiring to defeat the project and prevent the competition it would introduce and to pool among themselves the tonnage moving from the collieries of Simpson and Watkins, purchased or agreed to purchase in stated proportions the capital stock of The Temple Iron Company, an old corporation brought forth for the occasion, and caused it to acquire the aforesaid collieries with its securities issued especially for the purpose. Whereupon, weakened by the loss of these supporters, this attempt to construct the proposed independent railroad failed. (Pet., par. VIId, 1R., 21–23.)

(e) In the following year, 1899, after the abandonment of the New York, Wyoming & Western Railroad, the independent operators of the Wyoming region made a further attempt to carry through their project for a competing railroad, and The Pennsylvania Coal Company, the largest and most powerful of them, producing annually 2,000,000 tons, and controlling Erie & Wyoming Valley Railroad Company, which operates a railroad from a point near Scranton in the coal regions to Hawley, Pennsylvania, having secured sufficient pledges of tonnage from other independent operators, undertook to build a railroad from Hawley to Lackawaxen and thence across the State of New York to Rondout on the Hudson River, making a connected independent line from the coal regions to tidewater; and to that end organized, under the laws of New York, Delaware Valley & Kingston Railroad Company, obtained from the railroad commission of that State, over the opposition of other railroads, a certificate that the proposed road was necessary, a condition precedent to its construction, and purchased for a roadbed the abandoned Delaware & Hudson canal, extending from Rondout, on the Hudson River, across the State of New York, to Lackawaxen, Pennsylvania. Whereupon, defendant Erie Railroad Company, through the agency of J. P. Morgan & Company, acquired the capital stocks of The Pennsylvania Coal Company, Erie & Wyoming Valley Railroad Company, and Delaware Valley & Kingston Railroad Company, issuing for the purpose its first preferred shares of the par value of $5,000,000 and its bonds in the sum of $32,000,000, with the result that this second attempt to construct the proposed independ-

ent railroad from the mines and thereby introduce competition in the transportation and sale of anthracite was likewise defeated. (Pet., par. VIIIe; 1 R., 23, 24.)

The petition prayed discovery of the names of the independent producers with whom defendants had made the so-called 65 per cent contracts, and that it be adjudged and decreed—

(*a*) that defendants have created a combination and monopoly in restraint of trade and commerce among the States in violation of the Act of July 2, 1890, and that they be enjoined from continuing the same;

(*b*) that the so-called 65 per cent contracts are in violation of said Act, and that their further execution be enjoined;

(*c*) that the shares of The New York, Susquehanna & Western Railroad Company acquired by Erie Railroad Company were acquired and are held in violation of said Act, and that the latter be enjoined from voting them or receiving dividends thereon;

(*d*) that the shares of The Central Railroad Company of New Jersey acquired by Reading Company were acquired and are held in violation of said Act, and that the latter be enjoined from voting them or receiving dividends thereon;

(*e*) that the acquisition of the shares of The Temple Iron Company by Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, acting in concert, and the defeat through that combination of the proposed competing rail-

road, was in violation of said Act, and that the last-named defendants be enjoined from voting their shares in The Temple Iron Company or receiving any dividends thereon;

(*f*) and finally that such other relief be granted as the nature of the case may require. (1 R., 24–28).

THE ANSWERS AND DEMURRER.

All the defendants answered save Hillside Coal & Iron Company, which demurred generally for want of equity and specially for multifariousness. On the application of the United States a day was set for the argument of this demurrer, but in the meantime it was withdrawn and an answer substituted.

The substance of the answers is thus stated in the opinion of the presiding judge below (1 R., 395):

> These answers are several and separate, and each of them denies any participation in any combination or conspiracy, as charged against all the defendants in the seventh paragraph of the petition, and all knowledge or information in regard to the same. The separate acts charged against various groups of the defendants, as steps towards the alleged general conspiracy, and as independently unlawful, are also denied by those defendants, respectively, against whom the charge is made.

The answers also objected that the separate acts charged against varying groups of defendants as independently unlawful without reference to any general conspiracy made the petition multifarious. For example that of Reading Company states (1 R., 54):

> That it appears by the said petition that the same is exhibited against this defendant, and

> the several other corporations named therein as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said petition, this defendant is not in any manner interested or concerned, * * * [and] in several whereof, as appears by the petition, the said other defendants are not, and neither of them is, in any manner interested or concerned, * * * wherefore the said petition is altogether multifarious.

THE AMENDMENT TO THE PETITION.

When all the original defendants had answered, the United States, on October 17, 1907, amended its original petition by bringing in the independent producers with whom, as discovered in the answers, the original defendants had made the so-called 65 per cent contracts; also, The Pennsylvania Company for Insurances on Lives and Granting Annuities, which, as trustee under a collateral trust mortgage of defendant Reading Company, holds the legal title to the shares of The Central Railroad Company of New Jersey, which in the original petition Reading Company, the beneficial owner thereof, was asked to be enjoined from voting; and The Mercantile Trust Company, which, as trustee under a collateral trust mortgage of defendant Erie Railroad Company, holds the legal title to certain shares of The New York, Susquehanna & Western Railroad Company, which in the original petition Erie Railroad Company, the beneficial owner thereof, was asked to be enjoined from voting. (1 R., 38.)

The new defendants, excepting Excelsior Coal Company, were served with process, and all but that company and Llewellyn Mining Company and

Robert White answered, admitting their connection with the subject matter substantially as alleged, with the exception of Elk Hill Coal & Iron Company, Price-Pancoast Coal Company, and M. F. Dolphin, who denied that they had made any such contracts, as alleged, with any of the original defendants. (1 R., 148–332.) An order for a decree *pro confesso* against Llewellyn Mining Company was duly filed. (1 R., 332.) Defendant Robert White filed a disclaimer. (1 R., 317.)

JOINDER OF ISSUE.

January 21, 1908, the United States joined issue by filing its replication; and January 30, 1908, an examiner was appointed to take the evidence. (1 R., 333, 335.)

MOTIONS TO SUPPRESS TESTIMONY AND DISMISS THE PETITION.

Upon the United States concluding its testimony in chief, certain defendants made motions to suppress and strike out specified portions thereof on the grounds of irrelevancy, immateriality, and incompetency; and separate motions to dismiss the petition on the grounds that it does not state a cause of action and is multifarious. (1 R., 336, 383, 384–86.) The Court refused to hear these motions until the final hearing. (1 R., 387.)

THE DECISION OF THE CIRCUIT COURT.

Under authority of the act of February 11, 1903, "To expedite the hearing and determination of suits in equity * * * under the act of July 2, 1890," etc., the Attorney General filed a certificate stating that

in his opinion the case was of general public importance (1 R., 334). It was accordingly heard before the three circuit judges of the Third Circuit on February 21, 22, 23, and 24, 1910 (1 R., 466), and their three separate opinions were handed down December 8, 1910 (1 R., 392, 424, 441).

Refusing to dismiss the petition for multifariousness (1 R., 427, 428, 442, 443), the Court heard and adjudicated the several charges therein made of violations of the Act of July 2, 1890—as well the separate, independent charges against varying groups of defendants as the charge of a general combination against all.

The final decree, entered December 20, 1910, adjudged that the beforementioned defendant railroads, including defendant Reading Company, by and through The Temple Iron Company, are joined together in a combination in restraint of trade and commerce among the States in violation of the Act of July 2, 1890; that said defendants acquired and hold their interests in the stock of The Temple Iron Company in furtherance of such combination and that defendant The Temple Iron Company acquired the shares of certain named coal owning and producing companies likewise in furtherance thereof; and enjoined defendants from continuing such combination and from voting or profiting by the shares so acquired in furtherance thereof. (1 R., 466.)

It further adjudged, however, that the following vitally important charges were not sustained and dismissed the petition as to them (1 R., 467, 468), viz: (1) that defendants are parties to a general combination or conspiracy "to control, regulate, restrain, and monopolize * * * not only the

production of anthracite coal but its transportation * * * and its price and sale throughout the several States," in violation of the Act of Congress (Pet., par. VII); (2) that the so-called 65 per cent contracts by which defendant railroads and their affiliated coal companies obtained and hold control of a large part of the independent output are in violation of the Act (Pet., par. VIIa); (3) that the combination of Erie Railroad Company and The New York, Susquehanna & Western Railroad Company and their subsidiary coal companies is in violation of the Act (Pet., par. VIIb); (4) that the combination through a holding company of Philadelphia & Reading Railway Company and The Central Railroad Company of New Jersey, and their subsidiary coal companies, is in violation of the Act (Pet., par. VIIc); and (5) that the acquisition and holding by Erie Railroad Company of the capital stocks of The Pennsylvania Coal Company, Delaware Valley & Kingston Railroad Company, and Erie & Wyoming Valley Railroad Company is in violation of the Act (Pet., par. VIIe).

From the parts of the decree dismissing these charges the Government has appealed (1 R., 469–73); while defendants have prosecuted two separate appeals—one by The Temple Iron Company and the other by Reading Company, Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Erie Railroad Company, The New York Susquehanna & Western Railroad Company, Mount Lookout Coal Company, and Lackawanna Coal Company, Limited—from the part of the decree

adjudging that they are joined in an unlawful combination by and through The Temple Iron Company (1 R., 497–506).

ASSIGNMENT OF ERRORS.

The principal errors assigned by the Government stated broadly are the dismissal of the charges in respect of (1) the General Combination, (2) the 65 per cent contracts, (3) the combination of the Erie Railroad and the New York, Susquehanna & Western Railroad and their coal companies, (4) the combination of the Philadelphia & Reading Railway and the Central Railroad of New Jersey and their coal companies, (5) the holding by the Erie Railroad of the capital stocks of The Pennsylvania Coal Company, the Delaware Valley & Kingston Railroad, and the Erie & Wyoming Valley Railroad, (6) the holding by the Lehigh Valley Railroad of the capital stock of Coxe Brothers & Co.; and (7) refusal to dismiss without prejudice what was dismissed. (1 R., 470.)

The defendants who appealed assigned as errors the adjudication that they were joined in a combination in restraint of trade by and through The Temple Iron Company and the injunction against them on that account; also the award to the United States of a portion of its costs. (1 R., 498, 506.)

They did *not* assign as error the action of the Court in refusing to sustain the objection of multifariousness and hearing and determining in the one proceeding not only the charge of a general combination embracing all the defendants, but also the alleged separate and independent violations of the Act by varying groups without reference to any general combination. (1 R., 498, 506.)

That question, therefore, is no longer open.

THE FACTS ESTABLISHED.

THE ANTHRACITE DEPOSITS.

With insignificant exceptions, the only known deposits of anthracite of economic value underlie an area of 484 square miles in adjoining counties of eastern Pennsylvania, distant by rail, at the nearest points, 90 miles from Philadelphia, 145 miles from New York, 250 miles from Pittsburgh, and 265 miles from Buffalo. (Rep., Anthracite Coal Strike Com., Bul., Dept. Labor, No. 46, p. 444; "Anthracite Coal," by Wm. Griffith, The Bond Record, Vol. IV, pp. 1, 3; "The Pennsylvania Anthracite Coal Field," pub. by U. S. Geolog. Survey, p. 61.)

The deposits are divided geologically and geographically into four *fields*, designated by the Pennsylvania Geological Survey as the Northern, containing 176 square miles, in Lackawanna and Luzerne counties; the Eastern Middle, containing 33 square miles, in the southern extremity of Luzerne county; the Western Middle, containing 94 square miles, in Schuylkill, Columbia, and Northumberland counties; and the Southern, containing 181 square miles, in Schuylkill county, with projections into Dauphin and Carbon counties. For trade purposes they have been divided into three *regions*, the Wyoming, 176 square miles in area, embracing the Northern field; the Lehigh, 45 square miles, embracing the Eastern Middle field and the small projection of the Southern field east of Tamaqua; and the Schuylkill, 263 square miles, embracing all of the Southern field west of

Tamaqua and the entire Western Middle field. ("The Pennsylvania Anthracite Coal Field," pub. by U. S. Geolog. Survey, pp. 63–65; Ruley, 2 R., 90; Griffith, 2 R., 531, 532; Richards, 4 R., 683, 684.) Scranton and Wilkes-Barre are the principal towns of the Wyoming region, Hazleton of the Lehigh, and Pottsville of the Schuylkill.

The Wyoming region is the most forward in development, having for many years contributed considerably more than half the total output—in 1907, 57.58 per cent. The Lehigh region, the least productive, contributed 12.41 per cent in 1907, and the Schuylkill region 30.01 per cent. ("The Production of Coal in 1907," U. S. Geolog. Survey, p. 175.) Only free-burning white ash, the standard variety constituting not less than 75 per cent of the total production, is mined in the Wyoming region. In the Lehigh a hard white ash is produced and in the Schuylkill several varieties of red ash, in addition to free-burning white ash. (Ruley, 2 R., 98, 104; Montgomery, 2 R., 261; May, 4 R., 278.)

In value of output anthracite is outranked only by pig iron and bituminous coal among all the mineral products of the United States. Gold and silver, copper, lead, zinc, petroleum, natural gas, clay products, stone—all these are subordinate to it. ("Mineral Products U. S., 1898–1908," U. S. Geolog. Survey.)

The accepted map of the anthracite fields, showing the various mines, their operators and railroad outlets, prepared originally under the direction of the Pennsylvania Geological Survey and revised to January 1, 1908, by the Bureau of Anthracite Coal Statistics, is in evidence as Government Exhibit No. 13. (3 R., 46; Ruley, 2 R., 91, 33; Richards, 4 R., 683.)

TRANSPORTATION OUTLETS FROM THE ANTHRACITE FIELDS.

In the early years of the industry the coal was sent to market by river and canal. (Richmond, 2 R., 265; "Anthracite Coal," by Wm. Griffith, The Bond Record, Vol. IV, p. 3.) Soon, however, those agencies were displaced, until now virtually all of the coal not consumed in the vicinity of the mines moves to market over the railroad systems penetrating the region. (Ruley, 2 R., 69; Fuller, 2 R., 472.)

There are nine of these:

(1) The Philadelphia & Reading and its controlled lines, reaching into the Southern and Western Middle fields and thence to Philadelphia and from there through Pennsylvania and New Jersey to Port Reading on New York Harbor. (Harris, 2 R., 11, 12, 35; Map, Govt. Ex. No. 13, 3 R.)

(2) The Central Railroad of New Jersey and its controlled lines, entering the Southern, Eastern Middle, and Northern fields and extending thence through Pennsylvania and New Jersey to Port Johnston and Elizabethport and Jersey City, on New York Harbor. (Harris, 2 R., 11, 12, 35; Map, *supra.*)

(3) The Lehigh Valley and its controlled lines, reaching into all four of the fields and extending to Perth Amboy and Jersey City on New York Harbor and to Buffalo on Lake Erie. (Harris, 2 R., 12; Agreed Statement, 2 R., 633; Map, *supra.*)

(4) The Pennsylvania, which also reaches all of the fields. (Harris, 2 R., 12; Map, *supra.*)

(5) The Delaware, Lackawanna & Western, extending from the Northern field to Hoboken on New York Harbor and to Buffalo. (Harris, 2 R., 12; Agreed Statement, 2 R., 637; Map, *supra.*)

(6) The Erie, with lines owned or controlled extending from the Northern field to Weehawken on New York Harbor and to Buffalo and Chicago. (Harris, 2 R., 12; Cumming, 2 R., 362, 363; Map, *supra*.)

(7) The New York, Susquehanna & Western and its controlled lines, extending from the Northern field to Edgewater on New York Harbor. (Harris, 2 R., 12; Cumming, 2 R., 361, 393; Map, *supra*.)

(8) The New York, Ontario & Western, extending from the Northern field to tidewater at Cornwall and Weehawken and to Oswego on Lake Ontario. (Harris, 2 R., 12; Kerr, 2 R., 174, 5 R., 1058; Map, *supra*.)

(9) The railroad of The Delaware & Hudson Company, extending from the Northern field to the northward, but not to tidewater, unless Albany be considered such. (Harris, 2 R., 12; Map, *supra*.)

The Northern field is thus served by eight railroads, the Eastern Middle by three, the Western Middle by three, and the Southern by four.

All of these systems, or their predecessors in title, were in operation in the coal fields as far back as 1870 excepting the New York, Susquehanna & Western and the New York, Ontario & Western. (Harris, 2 R., 7, 8, 39.) By 1882 the New York, Susquehanna & Western had extended its line to a point of connection with the Delaware, Lackawanna & Western, at Gravel Place, Pennsylvania, 60 miles from the coal fields, and secured some anthracite tonnage, although it did not have a line of its own all the way to the mines until 1894. (Johns, 4 R., 69, 163, 197, 198; Sturges, 2 R., 279, 282, 310.) The New York, Ontario & Western completed its branch into the coal fields in 1890. (Kerr, 5 R., 1043.)

In 1907 the coal was transported from the mines by the beforementioned carriers in the following proportions (Govt. Ex. No. 14, 3 R., 53):

Railroad.	Gross tons.	Per cent.
Philadelphia & Reading Railway	14,018,795	20.89
Central Railroad of New Jersey	8,714,113	12.99
Lehigh Valley Railroad	11,532,255	17.18
Delaware, Lackawanna & Western Railroad	10,237,419	15.25
Erie Railroad (including N. Y., S. & W. R. R.)	7,151,683	10.66
Delaware & Hudson Company	6,562,768	9.78
Pennsylvania Railroad	6,203,271	9.24
New York, Ontario & Western Railway	2,689,089	4.01
Total	67,109,393	100.00

GEOGRAPHICAL DISTRIBUTION OF THE ANTHRACITE OUTPUT.

Anthracite is universally used for domestic purposes throughout New England and the Middle Atlantic States and to lesser extent in other sections of the country. The smaller sizes are also extensively used for steam purposes, principally in the East. Approximately 12 per cent of the total production is not shipped but consumed at local points and in the operation of the mines. (Ruley, 2 R., 69.) Of that shipped to market four-fifths, in round figures, moves outside Pennsylvania in the channels of interstate commerce, as appears from the appended table showing the geographical distribution of the shipments in 1905, a normal year (Baer, 5 R., 1221):

	Tons.
Pennsylvania	11,520,383
New York	18,125,419
New Jersey	7,212,341
New England States	8,692,504
Southern States	2,080,088
Western States	6,904,314
Pacific Coast	1,743
Canada	2,187,450
Other Foreign Countries	42,533
Supply Coal to Railroads	4,643,426
	61,410,201

THE PROPRIETORS OF THE ANTHRACITE SUPPLY.

The principal holders of the coal-bearing lands, starting in the Northern field, are:

(1) The Delaware, Lackawanna & Western Railroad Company, possessing 15,203 acres in the Northern field, of which 7,786 were acquired subsequently to January 1, 1874, when the present Constitution of Pennsylvania took effect. (Govt. Ex. No. 70, 3 R., 151; Lamonte, 5 R., 939.)

(2) The Delaware & Hudson Company, possessing (including lands held by Hudson Coal Company and Northern Coal & Iron Company, whose shares it owns, and by Schuylkill Coal & Iron Company and Shanferoke Coal Company, whose shares are owned by Hudson Coal Company) 25,180 acres in the Northern and Southern fields, principally in the former, of which 13,746 were acquired subsequently to January 1, 1874. (Govt. Exs. Nos. 123, 124, 3 R., 208, 210.)

(3) Hillside Coal & Iron Company, possessing (including 2,866 acres leased to others and 1,821 held by Butler Mine Company and Clarence Coal Company, whose shares it owns) 13,466 acres in the Northern field (Govt. Exs. Nos. 82, 83, 3 R., 171; Bosman, 2 R., 489; Richardson, 2 R., 129). This company refused to disclose what portion of its holdings was acquired subsequently to January 1, 1874. (2 R., 590.)

(4) The Pennsylvania Coal Company, possessing (including 537 acres leased to others) 13,900 acres in the Northern field. (Govt. Ex. No. 84, 3 R., 172; Richardson, 2 R., 129.)

(5) The New York, Susquehanna & Western Coal Company, possessing 963 acres in the Northern field, all leased to others. (Govt. Ex. No. 100, 3 R., 188; Richardson, 2 R., 129.)

(6) Scranton Coal Company, possessing (including the lands of Black Diamond Coal Company, whose shares it owns) 2,695 acres in the Northern field, all acquired subsequently to January 1, 1874. (Govt. Ex. No. 118, 3 R., 201.)

(7) Elk Hill Coal & Iron Company, possessing 3,049 acres in the Northern field, all acquired subsequently to January 1, 1874. (Govt. Ex. No. 118, 3 R., 201.)

(8) The Lehigh & Wilkes-Barre Coal Company, possessing (including 1,760 acres leased to others) 15,650 acres, nearly all in the Northern field, of which 1,694 were acquired subsequently to January 1, 1874. (Govt. Exs. Nos. 44, 47, 3 R., 119, 122.)

(9) The Temple Iron Company, possessing, together with six subsidiary companies (in five of which it owns all the shares and in one, four-fifths), 4,465 acres in the Northern field, all acquired subsequently to January 1, 1874. (Govt. Exs. Nos. 108, 109, 110, 3 R., 195, 196; Law, 2 R., 323, 492.)

(10) Susquehanna Coal Company, which possesses (including 247 acres leased to others) 8,906 acres, and whose affiliated companies, Mineral Railroad & Mining Company, Summit Branch Mining Company, and Lytle Coal Company, together possess 7,961, making in all 16,867, located in the Northern, Western Middle, and Southern fields, of which 4,899 were acquired—referring now to original acquisitions—subsequently to January 1, 1874. (Govt. Exs. Nos. 130–138, 3 R., 215–19; Ross, 2 R., 253.) The present

title, however, of the Summit Branch Mining Company to 5,663 acres, dates from April 8, 1901, when they were conveyed to it by the purchaser at a judicial sale of the property of a predecessor company (Govt. Ex. No. 137, 3 R., 219), and including these the number acquired subsequently to January 1, 1874, would be increased to 10,562.

(11) The Lehigh Valley Coal Company, possessing (including 7,285 acres leased to others) 37,047 acres, in all four of the fields, of which 29,778 were acquired subsequently to January 1, 1874. (Govt. Ex. No. 59, 3 R., 136.)

(12) Coxe Brothers & Company, Inc., possessing 5,311 acres in the Eastern Middle and Southern fields. (Govt. Ex. No. 59, 3 R., 136.)

(13) The Philadelphia & Reading Coal & Iron Company, possessing (including 3,881 acres leased to others) 98,077 acres in the Western Middle and Southern fields, of which 19,262 were acquired—referring now to original acquisitions—subsequently to January 1, 1874. (Govt. Exs. Nos. 30, 33, 3 R., 103, 105; Brown, 2 R., 203.) The present title of the company to practically the entire holdings, however, dates from November 18, 1896, when they were conveyed back to it after having been sold in foreclosure proceedings September 23, 1896. (Agreed Statement, 2 R., 608, 609.)

(14) The Lehigh Coal & Navigation Company, possessing (including 2,154 acres leased to others) 13,783 acres in the Southern field. (Govt. Ex. No. 1, 3 R., 1; Lathrop, 2 R., 45.)

The several companies above named and their holdings are assembled in the following table.

Table Showing Distribution of Anthracite Coal Lands Among Principal Holders.

Names of holders.	Area possessed.
	Acres.
Delaware, Lackawanna & Western Railroad Company	17,353
Delaware & Hudson Company and subsidiaries	25,180
Hillside Coal & Iron Company	13,466
Pennsylvania Coal Company	13,900
New York, Susquehanna & Western Coal Company	963
Scranton Coal Company	2,695
Elk Hill Coal & Iron Company	3,049
Lehigh & Wilkes Barre Coal Company	15,650
Temple Iron Company and subsidiaries	4,465
Susquehanna Coal Company and affiliated companies	16,867
Lehigh Valley Coal Company	37,047
Coxe Brothers & Company, Inc	5,311
Philadelphia & Reading Coal & Iron Company	98,077
Lehigh Coal & Navigation Company	13,783
Total	267,806
Total Coal Area (484 square miles)	309,760

The amount of coal underlying the superficial areas of the various proprietors can only be estimated. However, with a long recorded experience and the resources of science it is possible to make estimates with reasonable accuracy—with such a degree of accuracy that many millions have been invested upon the strength of them.

In 1895 William Griffith, of Scranton, mining engineer and geologist, and an accepted authority, from the fullest available data, including that collected by the then recent exhaustive official survey, of which he had been a member, constructed for a banking house in New York for their guidance in investments an estimate of the minable coal then in the ground that would be shipped to market, showing, among other things, the portions owned or controlled by contract by each of the large interests, so-called, and the duration of the supply of each at the rate of shipments in that year. From this estimate, cited by the Strike Commission of 1902 in its award (Bul., Dept. Labor, No. 46, p. 448), and which is in evidence with a full statement of the data and methods of calculation employed (Govt. Ex. No. 157, 3 R., 328; Griffith, 2 R., 529–539), the table following has been compiled.

Estimated minable coal in the ground that will be shipped to market, distribution thereof among the principal owners[1], *and duration of the supply of each, as of the year 1895.*

Name of Owners.	Unmined Coal Owned and Controlled by Contract.				Duration at rate of shipments in 1895.
	Owned.	Per cent of total.	Owned and Controlled by Contract.	Per cent of total.	
	Tons.		*Tons.*		*Years.*
The D., L. & W. R. R. Co.	300,853,150	5.93	332,332,000	6.55	54
The D. & H. Co. and subsidiaries	115,823,200	2.28	115,823,200	2.29	26
Hillside C. & I. Co.	34,718,100	.68	38,879,400	.77	21
The Pa. Coal Co.	94,876,600	1.87	94,876,600	1.82	54
The N. Y., S. & W. Coal Co.	13,551,850	.27	26,890,500	.54	18
Scranton Coal Co.	.....	.....	13,971,100	.28	9
The L. & W.-B. Coal Co. and The L. C. & Nav. Co.	863,760,350	17.02	877,569,700	17.30	163
Sus. Coal Co. and affiliated companies	248,142,050	4.89	316,502,750	6.24	63
The L. V. Coal Co.	787,200,700	15.52	855,511,750	16.87	116
Coxe Bros. & Co. (Inc.)	67,361,334	1.33	69,901,200	1.38	35
The P. & R. C. & I. Co.	2,087,490,600	41.14	2,143,706,500	42.25	216
Remainder	460,008,816	9.07	187,822,050	3.71	.....
Grand total	5,073,786,750	100.00	5,073,786,750	100.00	.....

[1] In the original estimate the coal-carrying railroads were named as the owners of the coal, when, of course, strictly speaking, their subsidiary coal companies were meant (Griffith, 2 R., 535), excepting in the cases of the D., L. & W. and the D. & H., which own coal in their own names. Accordingly, in this table, in place of the railroads (other than the D., L. & W. and D. & H.), their respecitve subsidiary or affiliated coal companies, as the evidence has disclosed them, have been substituted as follows: Hillside C. & I. Co. for Erie R. R. Co.; The Pa. Coal Co. for Erie & Wyoming Valley R. R. Co.; The N. Y., S. & W. Coal Co. for N. Y., S. & W. R. R. Co.; Scranton Coal Co. for N. Y., O. & W. Ry. Co.; Lehigh & W.-B. Coal Co. and Lehigh Coal & Nav. Co. for Cent. R. R. Co. of N. J.; Susquehanna Coal Co. for Pa. R. R. Co.; The Lehigh Valley Coal Co. for Lehigh Valley R. R. Co.; Coxe Bros. & Co., Inc., for Del., Sus. & Schuyl. R. R. Co.; The P. & R. C. & I. Co. for P. & R. Ry. Co. (*infra*, pp. 34–47).

Observe that this is an estimate of the coal that can be produced *and shipped*. As part is not shipped, but consumed at and near the mines, the total production would be more by 10 per cent. (Griffith, 2 R., 534.) Moreover, the witness testified that if account were taken of the improved methods of mining and burning anthracite, introduced since 1895, the estimate would be increased 25 per cent. (Griffith, 2 R., 536, 540.) On the other hand the shipments now, taking the average of the last four years, are about 30 per cent greater than in 1895. (Govt. Ex. No. 14, 3 R., 47.)

Since 1895 The Delaware, Lackawanna & Western Railroad Company has added to its holdings of coal-bearing lands 2,800 acres (Govt. Ex. No. 71, 3 R., 152); The Delaware & Hudson Company and its subsidiaries, 9,903 (Govt. Ex. No. 125, 3 R., 211);

Hillside Coal & Iron Company, 337 (Govt. Ex. No. 82, 3 R., 171); The Pennsylvania Coal Company, 679 (Govt. Ex. No. 84, 3 R., 172); Scranton Coal Company, 2,573 (Govt. Ex. No. 118, 3 R., 201); The Lehigh & Wilkes-Barre Coal Company and The Lehigh Coal & Navigation Company, 379 (Govt. Ex. Nos. 1, 45, 46, 3 R., 1, 119, 120); Susquehanna Coal Company and affiliated companies, 160 (Govt. Ex. No. 136, 3 R., 218); The Lehigh Valley Coal Company, 11,571 (Govt. Ex. No. 60, 3 R., 132); and The Philadelphia & Reading Coal & Iron Company, 926 (Govt. Exs. Nos. 31, 32, 3 R., 104). So the proportion of the unmined coal owned by these companies is obviously not less now than then.

In 1901, after the acquisition by Reading Company of a majority of the shares of The Central Railroad Company of New Jersey, the former stated in its annual report that the Reading system then owned and controlled about 63 per cent of all the unmined anthracite coal in Pennsylvania (2 R., 567). And in the report of The Philadelphia & Reading Railroad Company for 1891 it was stated that—

> The coal lands of The Philadelphia & Reading Coal & Iron Company comprise in extent about 33 per cent of the entire anthracite-coal fields of the State, and, taking into account the aggregate thickness of the veins on the Company's lands, and the greater proportionate depletion of the estates in the other regions which has been going on for many years, it must be conceded that we have at least 50 per cent of the entire deposit remaining unmined. (2 R., 712.)

THE PRODUCERS AND SELLERS OF ANTHRACITE.

The principal proprietors of the coal-bearing lands, as just enumerated, also produce and market much the greater part of the annual output, and their share

of the total production goes on increasing as they absorb the smaller producers, having risen from 62.04 per cent in 1900 to 78.04 per cent in 1907.

The following table shows the total output in 1900 and 1907, the principal operators, and the tons and percentage of the whole produced by each (Govt. Ex. No. 169, 3 R., 416, 417):

Table Showing Total Output of Anthracite in 1900 and 1907 and Distribution Thereof Among Principal Operators.

Operators.	1900		1907	
	Production.	Per cent of total.	Production.	Per cent of total.
Philadelphia and Reading Coal and Iron Company [1]	8,279,280	16.17	12,304,608	16.01
Lehigh and Wilkes-Barre Coal Company [2]	3,079,828	6.01	4,451,033	5.79
Delaware, Lackawanna and Western Railroad Co.	4,922,735	9.61	9,249,692	12.04
Lehigh Valley Coal Company [3]	3,138,973	6.13	6,676,069	10.51
Coxe Brothers and Company, Incorporated [3]			1,394,265	
Pennsylvania Coal Company [4]			4,246,663	7.59
Hillside Coal and Iron Company [4]	759,966	1.48	1,586,901	
Temple Iron Company [5]	1,328,134	2.59	1,150,105	
Edgerton Coal Company [6]				
Lackawanna Coal Company (Ltd.) [7]			310,920	2.67
North West Coal Company [6]				
Sterrick Creek Coal Company [6]			592,799	
Total	21,508,916	41.99	41,963,055	54.61
Lehigh Coal and Navigation Company [8]	1,981,947	3.87	3,178,016	4.14
Total	23,490,863	45.86	45,141,071	58.75
Delaware and Hudson Company	4,282,988	8.37	6,661,086	9.50
Hudson Coal Company [9]			637,879	
Susquehanna Coal Company [10]	1,277,538		3,168,473	
Mineral Railroad and Mining Company [11]	615,617		619,722	
Lykens Valley Coal Company [12]	695,656	5.58	444,315	6.44
Summit Branch Mining Company [13]			296,739	
Lytle Coal Company [13]	270,911		414,286	
Scranton Coal Company [14]	618,735	2.23	2,576,716	3.35
Elk Hill Coal and Iron Company [14]	522,509			
Total	31,774,817	62.04	59,960,287	78.04
All other operators [15] [16]	19,443,500	37.96	16,875,795	21.96
Grand total	51,218,317	100.00	76,836,082	100.00

[1] Entire capital stock owned by Reading Company.
[2] $8,462,650 of its capital stock of $9,212,500 owned by Central R. R. Co. of N. J.
[3] Entire capital stock owned by Lehigh Valley R. R. Co.
[4] Entire capital stock owned by Erie R. R. Co.
[5] Entire capital stock owned by Reading Co., Central R. R. of N. J., Delaware, Lackawanna and Western R. R. Co., Lehigh Valley R. R. Co., Erie R. R. Co., and N. Y., Susquehanna and Western R. R. Co.
[6] Entire capital stock owned by Temple Iron Co.
[7] Four-fifths of capital stock owned by Temple Iron Co.
[8] For relation between this company and Central R. R. of N. J., see *infra*, p. 40; also Govt. Ex. No. 2, 3 R., 2.
[9] Entire capital stock owned by Delaware and Hudson Co.
[10] Entire capital stock owned by Pennsylvania R. R. Co.
[11] One-third of capital stock owned by Pennsylvania R. R. Co. and two-thirds by Northern Central Ry. Co., a majority of whose stock is owned by Pennsylvania R. R. Co.
[12] $482,450 of its capital stock of $494,150 owned by Summit Branch Mining Co.
[13] $628,600 of its capital stock of $800,000 owned by Susquehanna Coal Company.
[14] Entire capital stock owned by New York, Ontario and Western Railway Co.
[15] For names and production of each, see Govt. Ex. No. 170, 3 R., 418.
[16] Of the output in 1907 of operators in this class, 6,524,555 tons were from colleries and washeries covered by 65% contracts with railroad coal companies or Delaware, Lackawanna and Western R. R. Co.; as to remainder, see Govt. Exs. No. 170 and No. 171, 3 R., 418, 427.

The following table shows the proportions of the total output in 1907 marketed by the principal operators, being the amount produced by each plus the amount purchased by it at the mines under the perpetual 65 per cent contracts or from year to year:

Table Showing Total Output of Anthracite in 1907 and the Proportions Thereof Marketed by Principal Operators.

Operators.	Produced.[16]	Purchased at mines.	Marketed.	Per cent of total production.
Philadelphia & Reading Coal & Iron Co.[1]	12,304,608	[17] 1,428,152	13,732,760	17.87
Lehigh & Wilkes-Barre Coal Company [2]	4,451,033	[18] 971,508	5,422,541	7.06
Delaware, Lackawanna & Western R. R. Co.	9,249,692	[19] 1,159,655	10,409,347	13.56
Lehigh Valley Coal Company [3]	6,676,069	[20] 4,417,989	11,094,058	14.44
Coxe Brothers & Company, Incorporated [4]	1,394,265	.....	[21] None.	.....
Pennsylvania Coal Company [4]	5,833,564	[22] 2,276,977	8,110,541	10.56
Hillside Coal and Iron Company [4]				
Temple Iron Company [5]	1,150,105	.....		
Edgerton Coal Company [6]	.....	.....		
Lackawanna Coal Company, (Ltd.) [7]	310,920	.....	[23] None.	.....
North West Coal Company [6]	.....	.....		
Sterrick Creek Coal Company [6]	502,799	.....		
	41,963,055	10,254,281	48,769,247	63.49
Lehigh Coal and Navigation Company [8]	3,178,016	.....	3,178,016	4.14
	45,141,071	10,254,281	51,947,263	67.63
Delaware and Hudson Company	6,661,086	[24] 168,774	[25] 4,878,937	7.18
Hudson Coal Company [9]	637,879	.....	637,879	
Susquehanna Coal Company [10]				
Mineral Railroad and Mining Company [11]				
Lykens Valley Coal Company [12]	4,943,535	[26] 2,317,128	7,260,663	9.45
Summit Branch Mining Company [13]				
Lytle Coal Company [13]				
Scranton Coal Company [14]	2,576,716	[27] 422,023	2,998,739	3.90
	59,960,287	13,162,206	67,723,481	88.16
All other operators [15]	16,875,795			
Total production	76,836,082			

[1] Entire capital stock owned by Reading Company.
[2] $8,462,650 of its capital stock of $9,212,500 owned by Central R. R. Co. of N. J.
[3] Entire capital stock owned by Lehigh Valley R. R. Co.
[4] Entire capital stock owned by Erie R. R. Co.
[5] Entire capital stock owned by Reading Co., Central R. R. of N. J., Delaware, Lackawanna and Western R. R. Co., Lehigh Valley R. R. Co., Erie R. R. Co., and N. Y., Susquehanna and Western R. R. Co.
[6] Entire capital stock owned by Temple Iron Co.
[7] Four-fifths of capital stock owned by Temple Iron Co.
[8] For relation between this company and Central R. R. of N. J., see *infra*, p. 40; also Govt. Ex. No. 2, 3 R., 2.
[9] Entire capital stock owned by Delaware and Hudson Co.
[10] Entire capital stock owned by Pennsylvania R. R. Co.
[11] One-third of capital stock owned by Pennsylvania R. R. Co. and two-thirds by Northern Central Ry. Co., a majority of whose stock is owned by Pennsylvania R. R. Co.
[12] $482,450 of its capital stock of $494,150 owned by Summit Branch Mining Co.
[13] $628,600 of its capital stock of $800,000 owned by Susquehanna Coal Company.
[14] Entire capital stock owned by New York, Ontario and Western Railway Co.
[15] For names and production of each, see Govt Ex. No. 170, 3 R., 418.
[16] Govt. Ex. No. 169, 3 R., 416–17.
[17] Govt. Exs. Nos. 34, 35, 3 R., 106, 109.
[18] Govt. Ex. No. 48, 3 R., 122.
[19] Govt. Ex. No. 72, 3 R., 153.
[20] Govt. Ex. No. 62, 3 R., 140; also includes output of G. B. Markle & Co., 981,956 tons (3 R., 422), which Lehigh Valley Coal Co. markets under long-term contract (see Govt. Ex. No. 151, 3 R., 312).
[21] Entire output sold at mines to Lehigh Valley Coal Co.
[22] Govt. Ex. No. 88, 3 R., 176.
[23] Entire output sold at mines to Lehigh Valley Coal Co., Delaware, Lackawanna & Western R. R. Co., and Hillside Coal & Iron Co.
[24] Govt. Ex. No. 124, 3 R., 213.
[25] Sold at mines to Hillside Coal & Iron Co., 1,221,808 tons (3 R., 300–01), and to Susquehanna Coal Co., 729,025 tons (3 R., 219), which have been deducted from its production to ascertain amount marketed by Delaware & Hudson Co.
[26] Govt. Exs. Nos. 139, 170, 3 R., 219, 418 et seq.
[27] Govt. Ex. No. 119, 3 R., 202.

RELATIONS BETWEEN COAL OWNING AND PRODUCING COMPANIES AND THE RAILROADS.

(A) PHILADELPHIA & READING RAILWAY COMPANY AND THE PHILADELPHIA & READING COAL & IRON COMPANY.

The mines of The Philadelphia & Reading Coal & Iron Company are located on and their product is shipped over the system of Philadelphia & Reading Railway Company. (Brown, 2 R., 204; Govt. Ex. No. 22, 3 R., 92.)

From shortly after the organization of the coal company in 1871 until September 23, 1896, all of its shares had been owned by the predecessor of Philadelphia & Reading Railway Company, The Philadelphia & Reading *Railroad* Company (Taylor, 2 R., 191; Agreed Statement, 2 R., 605, 607), which was chartered by an Act of Pennsylvania approved April 4, 1833 (Pa. Laws, 1832–33, p. 144), wherein it was provided that nothing in the charter should be considered as giving to the company any—

> liberties, privileges, or franchises but such as may be necessary or incident to the making and maintaining of the said railroad, and the conveyance of passengers, and the transportation of the mail, and of goods, merchandise, and commodities thereon.

In 1893, The Philadelphia & Reading Railroad Company having defaulted in the payment of obligations secured by a mortgage covering not only its property but as well that of The Philadelphia & Reading Coal & Iron Company, the United States Circuit Court put both corporations in the hands of receivers, and September 23, 1896, under an order

of the court directing that the mortgage be foreclosed, all the properties of the companies were offered for sale, and Charles H. Coster and Francis Lynde Stetson became the purchasers in accordance with a plan of reorganization of which J. P. Morgan & Company were the managers. (Agreed Statement, 2 R., 607, 608.) Mr. Coster was a member of J. P. Morgan & Company and Mr. Stetson was their counsel.

The Philadelphia & Reading Railroad Company was thus divested through bankruptcy of the shares of The Philadelphia & Reading Coal & Iron Company, which it had acquired *before* the adoption of the Pennsylvania Constitution of 1874, which provides that—

> no incorporated company, doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works (Art. XVII, Sec. 5);

and the succeeding steps taken by the purchasers will be easier to follow if it be borne in mind that the great legal problem in the reorganization was how to evade this constitutional prohibition and reunite railroad and coal company in ownership and management as before.

November 17, 1896, the purchasers organized under the laws of Pennsylvania a new corporation, Philadelphia & Reading Railway Company, to which they conveyed the railroad properties, but not the equipment, formerly belonging to The Philadelphia & Reading Railroad Company, in consideration whereof the *railway* company issued its capital stock to the amount of $20,000,000 and its mortgage bonds for the same amount; and December 1, 1896, the re-

ceivers surrendered possession to the new company. (Agreed Statement, 2 R., 608.)

November 18, 1896, the purchasers reconveyed to The Philadelphia & Reading Coal & Iron Company the coal lands, mines, shares of subsidiary companies, and other property formerly belonging to it, and December 1, 1896, the receivers surrendered possession. (Agreed Statement, 2 R., 609.)

At this juncture enters Reading Company, through which the reunion of the coal company with the railroad system was to be accomplished. Amongst the securities acquired from The Philadelphia & Reading Railroad Company by the purchasers at the foreclosure sale was the entire capital stock, $50,000, of National Company, a corporation created under the name of Excelsior Enterprise Company by an Act of Pennsylvania approved May 24, 1871, with power to buy and sell the shares and bonds of other corporations and to engage in any business, save only banking, from building and running a railroad to keeping a grocery store or a pawnshop. (See its charter, 2 R., 620–625.) The Philadelphia & Reading Railroad Company had acquired the stock of this National Company in 1879. It seems to have been thrown in with the lease of the Delaware & Bound Brook Railroad. The company had no property and no business and during all the time The Philadelphia & Reading Railroad Company had been the owner of its shares had done nothing but go through the form of holding annual meetings of its one stockholder and electing officers with nothing to do. (Taylor, 2 R., 194, 195.)

This moribund corporation the reorganizers made their instrument. November 6, 1896, its capital

stock was jumped up from $50,000 to $40,000,000. December 7 following its name was changed to Reading Company. A few days later, December 18, its capital stock was further increased to $140,000,000. (Agreed Statement, 2 R., 610.) Thereupon, December 23, the purchasers at the foreclosure sale transferred to it the entire capital stocks of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company of $20,000,000 and $8,000,000, respectively, the entire bond issue of the former, $20,000,000, *in one bond*, and all other property, including railroad and marine equipment, acquired by the purchasers at the foreclosure sale and not by them conveyed as aforesaid to Philadelphia & Reading Railway Company or The Philadelphia & Reading Coal & Iron Company. (Agreed Statement, 2 R., 610, 611.) January 5, 1897, a general mortgage of this and some additional property was executed by Reading Company, with The Philadelphia & Reading Coal & Iron Company as joint obligor, to secure $135,000,000 of bonds, which, so far as issued, together with certificates of beneficial interest in the shares of Reading Company—the shares themselves having been deposited in a voting trust—were distributed as provided in the plan of reorganization. (Agreed Statement, 2 R., 611.)

Reading Company has continued to own all the shares of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company, directs how they shall be voted, and receives such dividends as accrue upon them. (Taylor, 2 R., 188, 189; Harris, 2 R., 10; Agreed Statement, 2 R., 611.)

The three companies have the same president and the secretary of Reading Company and Philadelphia & Reading Railway Company is vice-president of The Philadelphia & Reading Coal & Iron Company. (Taylor, 2 R., 188.) Of the six directors each of the railway and the coal and iron company they have five in common and these make up a majority of the directors of Reading Company. (Govt. Exs. Nos. 17, 19, 23, 3 R., 88, 90, 96.)

Philadelphia & Reading Railway Company pays an annual dividend of 30 per cent on its capital stock, which all goes, of course, to Reading Company and constitutes, with other receipts from the railway, at least 75 per cent of its entire income. (Taylor, 2 R., 189, 194.) The coal company has never paid a dividend. (Taylor, 2 R., 190.) On the other hand, it is indebted to Reading Company in the round sum of $80,000,000, carried as an open account, all but about $12,000,000 of which represents advances made to it from time to time until 1902, first by The Philadelphia & Reading Railroad Company, predecessor of Philadelphia & Reading Railway Company, and after 1896 by Reading Company. (Taylor, 2 R., 190, 191; Brown, 2 R., 205; Henderson, 4 R., 546, 547.) It has paid interest on this sum only since 1902, at the present time at the rate of 2 per cent, and never higher than that. (Taylor, 2 R., 190.)

In 1898 all the locomotives, cars, steam colliers, tugs, and barges used by Philadelphia & Reading Railway Company were owned by Reading Company (2 R., 32, 33), and of the cost of equipment added since then, $28,483,057.09, Reading Company has contributed $19,436,391.45. (2 R., 716.)

It has already appeared that the general mortgage of Reading Company is a lien upon the capital stock of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company, upon the bonds of the former, and upon the coal lands and other property of the latter, which is a joint obligor with Reading Company. And from the mortgages executed in the reorganization by Philadelphia & Reading Railway Company and Reading Company, to which by stipulation we may refer (2 R., 611), it further appears that when the railway needs money for new construction, etc., it can not sell its bonds to the public, but must deliver them to Reading Company, which issues in exchange an equal amount of its own bonds, and it is from the sale of these that the needed funds are obtained. (Mortgage, P. & R. Ry. Co., Nov. 18, 1896, Art. I, sec. 3, p. 15; Gen. Mortgage, Reading Co., Jan. 5, 1897, Art. I, sec. 4, p. 27.)

The annual reports of the three companies are published in the same pamphlet, and while showing the operations of the companies separately, also show the results of their combined operations. In these reports, as well since the reorganization as before, expressions are to be found which prove that none more clearly than the management of the companies recognized their unity, that in fact and substance they were but different branches or departments of the same company. (2 R., 32, 564, 566, 567, 712, 713.)

(B) THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE LEHIGH COAL & NAVIGATION COMPANY, AND THE LEHIGH & WILKES-BARRE COAL COMPANY.

That part of the system operated by The Central Railroad Company of New Jersey extending from Phillipsburg on the Delaware River to the coal fields—the Lehigh & Susquehanna Railroad and branches aggregating 160 miles (Govt. Ex. No. 2, 3 R., 9, 16)—upon which it depends for its coal traffic, is owned by The Lehigh Coal & Navigation Company, which has leased it to the Central, virtually in perpetuity, for a rental of one-third of the gross receipts derived from the leased lines until a specified maximum is reached (Agreed Statement, 2 R., 628; Govt. Ex. No. 2, 3 R., 2). The Navigation Company, the tonnage from whose mines is a chief source of revenue of the leased lines, covenants to ship over them not less than three-fourths of its output, and the Central undertakes that the annual output of The Lehigh & Wilkes-Barre Coal Company, whose mines are located upon the leased lines, shall equal a stated percentage of the total production. (Govt. Ex. No. 2, 3 R., 3, 4, 5; Heilner, 2 R., 119.) Obviously this method of fixing the rental made The Lehigh Coal & Navigation Company in effect a perpetual partner with The Central Railroad Company of New Jersey in the operation of the Lehigh & Susquehanna Railroad and branches. This is admitted by Mr. Baer, president of the Central. (5 R., 1207.)

The Central owns $8,462,500, more than nine-tenths, of the $9,212,500 of capital stock of The Lehigh & Wilkes-Barre Coal Company, $6,651,750 of which it acquired *January 20, 1874*, in exchange

for shares of Wilkes-Barre Coal & Iron Company and Honey Brook Coal Company, and the remainder at different times thereafter. (Govt. Ex. No. 43, 3 R., 118.) The two companies have the same president, secretary, and treasurer, and of the seven directors of the coal company five are also directors of the railroad. (Govt. Exs. Nos. 39, 43, 3 R., 116, 118.) In the past the railroad has made large advances to the coal company, which has never paid a dividend. (Baer, 5 R., 1219.) The product of the coal company is shipped from the mines over the parent railroad. (Heilner, 2 R., 119.)

(C) THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

This railroad is itself an owner and producer of anthracite, which it ships to market over its own lines. It has no subsidiary coal owning or producing company. (Ans., D., L. & W. R. R., 1 R., 67; Loomis, 2 R., 580; Govt. Ex. No. 69, 3 R., 151.)

(D) LEHIGH VALLEY RAILROAD COMPANY, THE LEHIGH VALLEY COAL COMPANY, COXE BROTHERS & COMPANY, INCORPORATED, NEW YORK & MIDDLE COAL FIELD RAILROAD & COAL COMPANY, AND THE LOCUST MOUNTAIN COAL & IRON COMPANY.

The entire capital stock, $1,965,000, of The Lehigh Valley Coal Company, which has assets of $34,622,055.76 (Baird, 5 R., 777), is owned by Lehigh Valley Railroad Company, which acquired it in parts *November 13, 1875, September 2, 1904, September 25, 1905, and February 19, 1908.* (Govt. Ex. No. 57, 3 R., 134.) The mines of the coal company are located upon and are served by the Lehigh Valley Railroad. (Skeele, 2 R., 233; Govt. Ex. No. 56, 3 R., 133.)

The two have the same president, assistant to the president, treasurer, assistant treasurer, secretary and assistant secretaries, and the members of the executive committee of the coal company, excepting its mining engineer, are members of the corresponding committee of the railroad. (Govt. Ex. No. 58, 3 R., 134; Baird, 5 R., 772.)

The Lehigh Valley Coal Company has never paid a dividend. (Baird, 5 R., 771.) On the other hand millions of dollars have been advanced to it by the Lehigh Valley Railroad, which observed in its annual report for 1901 that "under existing *arrangements* the Lehigh Valley Coal Company is compelled to depend upon the Railroad Company for working capital to carry on its operations," and that $1,000,000 had been so advanced to it in that year. (Baird, 5 R., 771). The coal company's present indebtedness to the railroad is $10,537,000, represented by "certificates of indebtedness" (Baird, 5 R., 769, 770), on which no interest is paid. (Wilson, 5 R., 793.) Besides this, of the $13,208,500 of bonds of the coal company the railroad is guarantor of $12,596,000 (Baird, 5 R., 772), a large part of which were issued for advances made by the railroad, and upon all of which the railroad had generally paid the interest until 1904. (Baird, 5 R., 778.) The annual reports of the two are published together in the same pamphlet. (Baird, 5 R., 779.)

The entire capital stock of Coxe Brothers & Company, Inc., $2,910,150, was acquired by the Lehigh Valley Railroad *November 1, 1905*, the two have the same executive officers who are also the executive officers of The Lehigh Valley Coal Company, and the entire product of the Coxe company is disposed of

to The Lehigh Valley Coal Company, which markets it. (Govt. Exs. Nos. 57, 58, 3 R., 134, 135; Agreed Statement, 2 R., 634.)

A majority of the capital stock of New York & Middle Coal Field Railroad & Coal Company and of Locust Mountain Coal & Iron Company was acquired by the Lehigh Valley Railroad between 1868 and 1872. (Govt. Ex. No. 57, 3 R., 134.) These coal companies, which also have the same executive officers as the railroad, produce no coal, and all the coal-bearing lands of the second and about one-fifth of the 1,211 acres of the first are leased to The Lehigh Valley Coal Company. (Govt. Ex. Nos. 58, 59, 3 R., 135, 136.)

(E) ERIE RAILROAD COMPANY, HILLSIDE COAL & IRON COMPANY, AND THE PENNSYLVANIA COAL COMPANY.

The entire capital stock of Hillside Coal & Iron Company, $1,500,000, and of The Pennsylvania Coal Company, $5,000,000, is owned by Erie Railroad Company, the three companies have the same president, vice president, secretary, assistant secretary, comptroller, auditor, treasurer, and assistant treasurer, and a majority of each coal company's directors are also directors and officers of the railroad. (Richardson, 2 R., 135; Govt. Exs. Nos. 76, 80, 81, 3 R., 168, 170.) Their mines are located upon and served by the Erie Railroad or its controlled lines. (Govt. Ex. No. 79, 3 R., 169; Richardson, 2 R., 129, 136–38.)

The stock of the Hillside company was acquired in *1895* at the foreclosure sale of the property of New York, Lake Erie & Western Railroad Company, and that of The Pennsylvania Coal Company in *1901*. (Bosman, 2 R., 488.)

Neither has paid a dividend since the Erie Railroad has owned its shares. (Blauvelt, 2 R., 182, 431.) The former has suffered deficits steadily since 1903 (Blauvelt, 5 R., 1036, 1037), and is in debt to the railroad for advances of between $2,500,000 and $4,000,000, upon which no interest is paid, though as it falls due it is added to the debt. (Blauvelt, 5 R., 1035, 1036.)

(F) THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY AND THE NEW YORK, SUSQUEHANNA & WESTERN COAL COMPANY.

The New York, Susquehanna & Western Railroad Company between *1887* and *1895*, acquired $731,500 of the $1,229,500 of capital stock of The New York, Susquehanna & Western Coal Company, the two have the same president, vice-president, secretary, assistant secretary, comptroller, auditor, treasurer, and assistant treasurer, and all but one of the directors of the coal company are officers of the railroad. (Govt. Exs. Nos. 95, 99, 3 R., 186, 187.) This coal company is not now a producer or shipper of coal. (May, 4 R., 284, 285.)

(G) THE TEMPLE IRON COMPANY.

Since a full statement of the origin and operations of The Temple Iron Company will be necessary under a subsequent heading, it suffices here to state that, excepting 50 shares held by directors, its entire capital stock, $2,500,000, has been owned since *December 31, 1906*, by Reading Company (including its subsidiaries, Reading Iron Company and The Philadelphia & Reading Coal & Iron Company), The Central Railroad Company of New Jersey, The

Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, and that Mr. Baer, president of Reading Company, Philadelphia & Reading Railway Company, The Philadelphia & Reading Coal & Iron Company, The Central Railroad Company of New Jersey, and The Lehigh & Wilkes-Barre Coal Company; Mr. Truesdale, president of The Delaware, Lackawanna & Western Railroad Company; Mr. Thomas, president of Lehigh Valley Railroad Company and The Lehigh Valley Coal Company; and Mr. Underwood, president of Erie Railroad Company, Hillside Coal & Iron Company, The Pennsylvania Coal Company, The New York, Susquehanna & Western Railroad Company, and The New York, Susquehanna & Western Coal Company, are the ruling directors of the company (Govt. Exs. Nos. 106, 107, 3 R., 193, 194), which in turn owns the entire capital stock of Edgerton Coal Company, Northwest Coal Company, Sterrick Creek Coal Company, Mount Lookout Coal Company, Forty Fort Coal Company, and Babylon Coal Company, and three-fourths of that of Lackawanna Coal Company, Limited. (Law, 2 R., 324, 492.)

(H) THE DELAWARE & HUDSON COMPANY, HUDSON COAL COMPANY, AND NORTHERN COAL & IRON COMPANY.

The Delaware & Hudson Company, besides being a common carrier, itself owns and produces anthracite. It also owns the entire capital stock of Hudson Coal Company, $100,000, acquired in *March, 1901*, and of Northern Coal & Iron Company, $1,500,000, acquired in *December, 1869;* and the for-

mer in *1905* acquired the entire capital stock of Schuylkill Coal & Iron Company and of Shanferoke Coal Company, $1,000 and $5,000, respectively. (Govt. Ex. No. 123, 3 R., 208.) With but one exception the officers and directors of these four coal companies are drawn from those of The Delaware & Hudson Company. (*Ibid.*)

(I) PENNSYLVANIA RAILROAD COMPANY, SUSQUEHANNA COAL COMPANY, SUMMIT BRANCH COAL COMPANY, MINERAL RAILROAD & MINING COMPANY, LYTLE COAL COMPANY, AND LYKENS VALLEY COAL COMPANY.

The entire capital stock, $2,136,800, of Susquehanna Coal Company is owned by Pennsylvania Railroad Company, $1,000,000 of which it acquired *December 30, 1873*, and the remainder from time to time between *1875 and 1888*. (Govt. Ex. No. 130, 3 R., 215; Ross, 2 R., 252.) Pennsylvania Railroad Company has also owned all the stock, $25,000, of Summit Branch Mining Company since *December, 1901*, and it acquired a majority of that of the Summit Branch Railroad Company, a predecessor of the Summit Branch Mining Company, as early as June, 1874. (Govt. Ex. No. 132, 3 R., 216; Neilson, 2 R., 322, 323.) The same railroad and Northern Central Railway Company, a majority of whose stock it holds, own the entire capital stock, $300,000, of Mineral Railroad & Mining Company, the Pennsylvania owning one-third, acquired in *1875*, and the Northern Central two-thirds, acquired in *1865*. (Govt. Ex. No. 131, 3 R., 216; Neilson, 2 R., 322; Ross, 2 R., 252.) Susquehanna Coal Company owns $628,600, acquired in *1904*, of the $800,000 of capital stock of Lytle Coal Company (Govt. Ex. No. 134, 3 R., 217;

Ross, 2 R., 253), and Summit Branch Mining Company owns $482,450, acquired in *1902*, of the $494,150 of capital stock of Lykens Valley Coal Company. (Govt. Ex. No. 133, 3 R., 217; Ross, 2 R., 253.)

(J) NEW YORK, ONTARIO & WESTERN RAILWAY COMPANY, SCRANTON COAL COMPANY, AND ELK HILL COAL & IRON COMPANY.

The New York, Ontario & Western Railway Company acquired in *1899* and *1898*, respectively, and now owns, the entire capital stock of Scranton Coal Company, $200,000, and of Elk Hill Coal & Iron Company, $60,000. (Govt. Exs. Nos. 115, 116, 3 R., 199, 200.)

THE INDEPENDENT PRODUCERS.

The producers of anthracite not related to either of the coal carrying railroads are called independent or individual operators (Fleming, 2 R., 406; Fuller, 2 R., 473); but a distinction must be made between those remaining free of the railroads to the end and the larger group who sell their output at the mines to the railroads or railroad coal companies.

PROPORTION OF SHIPMENTS BY RAILROAD COAL COMPANIES.

The extent to which the railroads from the anthracite mines, through the coal companies united with them in ownership and management, have engrossed the anthracite coal produced along their lines appears from the table following.

Tonnage of Anthracite Coal Transported from the Mines in Calendar Year 1907 by the Initial Railroads to All Points and to New York Harbor, F. O. B., Divided to Show Portion Shipped by Coal Companies Affiliated with the Railroads and by All Others.

Railroad.	To All Points.				
	Total Shipments.	Shipped by Railroad's Affiliated Coal Company.		Shipped by All Others.	
	Long tons.	*Long tons.*	*Per cent.*	*Long tons.*	*Per cent.*
P. & R. Ry	14,018,795	[1] 12,072,286	86.11	1,946,509	13.89
C. R. R. of N. J	8,714,113	[2] 7,699,261	88.35	1,014,852	11.65
Lehigh V. R. R	11,532,255	[3] 8,950,099	77.61	2,582,156	22.39
D., L. & W. R. R	10,237,419	[4] 8,658,044	84.57	1,579,375	15.43
Erie R. R. (inc. N. Y., S. & W. R. R.)	7,151,683	[5] 6,875,449	96.14	276,234	3.86
Delaware & H. Co	6,562,768	[6] 6,562,768	100.00	.....	.....
Pennsylvania R. R	6,203,271	[7] 4,957,047	79.91	1,246,224	20.09
N. Y., O. & W. Ry	2,689,089	[8] 2,689,089	100.00	.....	.....
Total	67,109,393	58,464,043	87.12	8,645,350	12.88

Railroad.	To New York Harbor, F. O. B.				
	Total Shipments.	Shipped by Railroad's Affiliated Coal Company.		Shipped by All Others.	
	Long tons.	*Long tons.*	*Per cent.*	*Long tons.*	*Per cent.*
P. & R. Ry	2,228,537	[1] 1,783,995	80.05	444,542	19.95
C. R. R. of N. J	3,489,939	[2] 3,341,751	95.75	148,188	4.25
Lehigh V. R. R	2,412,018	[3] 2,111,227	87.53	300,791	12.47
D., L. & W. R. R	2,452,373	[4] 2,162,750	88.19	289,623	11.81
Erie R. R. (inc. N. Y., S. & W. R. R.)	2,835,587	[5] 2,672,574	94.25	163,013	5.75
Delaware & H. Co	None.	.....	.....	.....	.....
Pennsylvania R. R	1,800,627	[7] 1,712,442	95.10	88,185	4.90
N. Y., O. & W. Ry	968,828	[8] 968,828	100.00	.....	.....
Total	16,187,909	14,753,567	91.14	1,434,342	8.86

[1] Philadelphia & Reading Coal & Iron Co., shipper.
[2] Lehigh & Wilkes-Barre Coal Co. principally; also Lehigh Coal & Navigation Co. and Philadelphia & Reading Coal & Iron Co., shippers.
[3] Lehigh Valley Coal Co., shipper.
[4] Delaware, Lackawanna & Western R. R. Co., shipper.
[5] Hillside Coal & Iron Co. & Pennsylvania Coal Co., shippers.
[6] Delaware & Hudson Co. and controlled companies, shippers.
[7] Susquehanna Coal Co., shipper.
[8] Scranton Coal Co., shipper.

Note.—Sources of Table. (1) Under the heading "To All Points:" for the figures in the column, "Total Shipments," Govt. Ex. No. 14, 3 R., 53; for the shipments of P. & R. C. & I. Co. over P. & R. Ry., Ziegler, 2 R., 707; for the shipments of L. & W.-B. Coal Co., Lehigh C. & N. Co. and P. & R. C. & I. Co. over Cent. R. R. of N. J., de Forest, 2 R., 654; for the shipments of L. V. Coal Co. over L. V. R. R. Co. (approximate), Wilson, 2 R., 688, 689; for the shipments of D., L. & W. R. R. Co. over D., L. & W. R. R., Hustis, 2 R., 738; for the shipments of Hillside C. & I. Co. and Pa. Coal Co. over Erie R. R. and N. Y., S. & W. R. R., Blauvelt, 2 R., 648; for the shipments of D. & H. Co. over the D. & H. Railroad, Davies, 2 R., 644; for the shipments of Sus. Coal. Co. over Pa. R. R., Large, 2 R., 708; for the shipments of Scranton Coal Co. over N. Y., O. & W. Ry., Rickard, 2 R., 709. (2) Under the heading, "To New York Harbor, F. O. B.:" for the total shipments over P. & R. Ry., and the portion thereof shipped by P. & R. C. & I. Co., Ziegler, 2 R., 706; for the total shipments over Cent. R. R. of N. J. and the portion thereof shipped by L. & W.-B. Coal Co., Lehigh C. & N. Co., and P. & R. C. & I. Co., de Forest, 2 R., 650 (note that shipments are there given in net tons and hence had to be converted into gross tons for table above); for the total shipments over L. V. R. R. and the portion thereof shipped by L. V. Coal Co., Wilson, 2 R., 688; for the total shipments over D., L. & W. R. R. and the portion thereof shipped by D., L. & W. R. R. Co., Hustis, 2 R., 738; for the total shipments over Erie R. R. and N. Y., S. & W. R. R. and portion thereof shipped by H. C. & I. Co. and Pa. Coal Co., Blauvelt, 2 R., 647, 648; for the total shipments over Pa. R. R. and portion thereof shipped by Sus. Coal Co., Govt. Exs. Nos. 128, 140, 3 R., 214, 220; for the total shipments over N. Y., O. & W. Ry. and portion thereof shipped by Scranton Coal Co. (approximate), Govt. Ex. No. 112, 3 R., 197.

The tonnage shown by the preceding table to have been shipped over a given road by others than its own coal company is not all shipped by independent operators. For, since a coal company affiliated with one road in some instances controls the output of a colliery located on another, the shipments over a particular road by others than its own coal company may include some coal shipped by the coal company of another road. Allowance must also be made for fuel coal transported by the roads for themselves, and which, therefore, is not included in the shipments made by their coal companies. That the total of 8,645,350 tons in the column "Shipped by All Others" could not all have been shipped by independent producers is put beyond controversy by the fact that in 1907 the total production of the latter, not controlled by the railroad coal companies, was only 6,607,511, including coal not loaded on cars at all but consumed in the vicinity of the mines. (Govt. Ex. No. 171, 3 R., 427.)

The virtual monopoly of the anthracite produced along their lines which defendant carriers are thus shown to possess was acquired mainly through their ownership of the capital stock of coal producing and trading companies, which, armed with the power and resources of the railroads, have been able to gain steadily increasing control of the anthracite output, purchasing outright the mines of independents in many instances, and in others making contracts to control the output of their mines until exhausted. The relation between the carriers and these coal producing and trading companies has given their common owners a power for mischief too great to be resisted, and the general result is that each carrier has monopolized commerce in the coal originating on its lines.

THE POSITION OF NEW YORK HARBOR IN THE ANTHRACITE TRADE.

As seen, all but one of the railroads from the anthracite mines reach tidewater at New York Harbor, the principal market and distributing point for anthracite. (Baer, 5 R., 1221; Ann. Rep., P. & R. R. R. Co., 1890, 2 R., 563.) The terminals of these roads for coal traffic are located on the New Jersey side from Edgewater on the north, about opposite 110th Street, Manhattan, to South Amboy on the south. Traveling from north to south, at Edgewater are the terminals of the New York, Susquehanna & Western; at Hoboken those of the Delaware, Lackawanna & Western; at Weehawken those of the Erie and the New York, Ontario & Western; at Elizabethport and Port Johnston those of the Central Railroad of New Jersey; at Port Reading (and in former years Port Liberty, still its theoretical price-basing point) those of the Philadelphia & Reading; at Perth Amboy those of the Lehigh Valley; and at South Amboy those of the Pennsylvania. (Ruley, 2 R., 68, 69; Heilner, 2 R., 126; Peters, 2 R., 162, 166; Abbott, 2 R., 185; Henderson, 4 R., 604, 605.)

At these points, after passing the larger sizes over screens to remove the dust and small particles produced by abrasion in transportation, the coal is weighed and dumped into barges and sold free on board. (Ruley, 2 R., 69; Henderson, 4 R., 591; Brown, 4 R., 616.) From Edgewater, Hoboken, and Weehawken, known as the upper ports, the barge freight to alongside docks in New York is about 15 cents a ton. (Richardson, 2 R., 144; Abbott, 2 R., 185.) From the remaining or lower ports, which are

farther away, it is 5 cents more. To offset this difference in water freight the selling price is 5 cents a ton less at the lower ports, making the cost to the purchaser delivered alongside docks in New York the same whether bought at the terminal of one railroad or another. (Heilner, 2 R., 121, 122, 127, 128; Peters, 2 R., 162, 166; Skeele, 2 R., 236, 239; Ruley, 2 R., 69.) Besides that delivered free on board vessel at the various terminals, some of the coal shipped to New York Harbor is transferred, in the cars, to floats, which are towed to the points of destination. (Richardson, 2 R., 144; Ruley, 2 R., 94.) These shipments, however, are small. (Ruley, 5 R., 1004.)

A few figures will prove the dominance of this market in the anthracite trade. In 1907 total shipments of anthracite coal were 67,109,393 tons (Govt. Ex. No. 14, 3 R., 53), of which 17,478,093, over 25 per cent, went to New York Harbor. (Govt. Exs. Nos. 20, 40, 54, 67, 77, 96, 113, 128, 3 R., 91, 117, 132, 150, 168, 186, 197, 214.) Assuming that in 1907, as in 1905 (*supra*, p. 25), approximately one-fifth of the shipments were confined to points within Pennsylvania, then of the entire shipments to points outside Pennsylvania those to New York Harbor were 33 per cent.

The large companies in making the price of coal at the mines a percentage of that at New York Harbor, and the Strike Commission of 1902 in taking the prices there as the basis for the contingent sliding wage scale, recognized the controlling position of that market.

The expense of selling anthracite at New York Harbor was variously estimated by the witnesses as from 15 or 20 cents a ton (Henderson, 4 R., 595;

Lathrop, 2 R., 47), down to 4 cents, the latter including no allowance for bad debts (Heilner, 2 R., 124; Skeele, 2 R., 238, 239). Hillside Coal & Iron Company and The Pennsylvania Coal Company pay 2 per cent of the selling price. (Richardson, 2 R., 134.) Until April 1, 1908, the former paid, as to a large part of its coal, 15 cents a ton on the prepared and 10 cents on the smaller sizes. (Richardson, 2 R., 141.) The Lehigh Valley Coal Company receives 12½ cents a ton for selling the large and superior product of the G. B. Markle Company. (Govt. Ex. No. 151, 3 R., 312.) One of the witnesses who estimated the average expense of selling, taking all sizes into account, as 4 cents a ton, also estimated that for prepared sizes it would be 10 cents. (Skeele, 2 R., 239.) From this review of the evidence we conclude that 2 per cent of the selling price, or about 10 cents a ton on the prepared and 5 on the smaller sizes, is a fair average of the cost of selling anthracite at New York Harbor.

Besides the expense of selling, there is another expense incident to the marketing of anthracite at New York Harbor. As remarked above, the prepared sizes suffer a certain depreciation from abrasion in transit. The dust and small particles produced by this abrasion, called "pea and dust" or "screenings," are eliminated from coal shipped to New York Harbor by screening the carloads before they are dumped into barges. The "screenings" are about 1½ per cent of the carload, and since they are worth only about one-third as much per ton as the contents of the car, there is a resulting loss of about 1 per cent, or 5 cents a ton, which falls on

the shipper. (Lathrop, 2 R., 47; Heilner, 2 R., 124; Richardson, 2 R., 140; Skeele, 2 R., 237, 238; Henderson, 4 R., 591; Brown, 4 R., 616.) When coal is sold at the mines it is the custom to load upon the car a small quantity in excess of the weight purchased, not, however, to cover the loss from abrasion in transit, but to counterbalance the weight of water or ice in the car owing to the coal having been washed. "It was really that they should not be charged for the water that was there, which would drain out of the car. While it was an allowance in a sense, in reality it was an effort to obtain the actual weight of the coal carried." (Henderson, 4 R., 590, 591; Brown, 4 R., 616; Phillips, 5 R., 921, 930; Grier, 5 R., 803.)

These two items, the expense of selling at New York Harbor and the loss from abrasion on shipments to that point, have an important bearing on the legality of the 65 per cent contracts hereafter to be considered.

THE COMBINATIONS OF 1876-79 AND HEREIN OF THE ORIGIN OF THE BUREAU OF ANTHRACITE COAL STATISTICS.

February 18, 1876, The Philadelphia & Reading Railroad Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Delaware & Hudson Canal Company, and The Pennsylvania Coal Company, which controlled the Erie & Wyoming Valley Railroad, entered into a written agreement "for the government of the anthracite coal trade to competitive points" during that year. Competitive tonnage was defined as "all coal which, for final consumption or in transit, reaches any point upon the Hudson River

or the bay of New York, or which passes out of the capes of the Delaware," and the agreement provided in brief for the division of such tonnage between the parties in stated proportions and for the sale of coal at uniform prices. The Pennsylvania Railroad Company, while not a formal party, promised in writing that if the agreement were kept by the others it would see that shipments of its own coal companies to competitive points in 1876 would not be increased over those of the previous year, and that it would maintain rates as theretofore. To carry the agreement into effect a body called the Board of Control, composed of a representative of each company, was created, with power—

> (*a*) To establish from time to time the monthly prices at which coal shall be sold; (*b*) to provide for the increase or curtailment of the total quantity to be shipped to competitive points in any month, according to the requirements of the market; (*c*) to provide for the collection from time to time, from all the members, in the proportion of their yearly quotas, any funds which may be necessary to pay the expenses incurred or authorized by the Board of Control; [and] (*d*) to employ the services of an expert accountant, as an assistant to the secretary and treasurer, to keep the tonnage accounts of the several companies, and to receive, examine, and report upon the tonnage returns received from each interest. (Govt. Ex. No. 152, 3 R., 315, 316.)

Following the adoption of this agreement, John H. Jones, as he testified, was called from his employment with one of the lines of The Philadelphia & Reading Railroad Company to Philadelphia by Franklin B. Gowen, then president of the latter, and appointed expert accountant to the Board of Control,

and in that capacity "opened what is now the Bureau of Anthracite Coal Statistics," which proceeded to obtain from month to month from each party to the agreement its tonnage to competitive points, and in return made monthly reports to each of the tonnage of all the others, thus supplying the basis for regulating and enforcing the division of tonnage agreed upon. (Jones, 2 R., 591, 592, 602.) The agreement, according to Mr. Jones, went to pieces in August, 1876, and, excepting one in force in 1878 and part of 1879, he had no recollection of any other similar ones having been made. (Jones, 2 R., 594–598.) Under his direction the Bureau of Anthracite Coal Statistics continued, however, with some interruptions, to collect the same character of statistics until 1880, when its scope was enlarged to embrace not only the competitive tonnage of each of the roads, as theretofore, but as well their other (or local) coal tonnage, and in this form its work was kept up until 1892, when it was transferred with all of its records to W. W. Ruley, then Mr. Jones's assistant, who has since maintained it. (Jones, 2 R., 592, 593; Ruley, 2 R., 54–57; Govt. Ex. No. 6, 3 R., 33.)

The functions of the Bureau have greatly expanded, and there will be occasion to refer to it in stating more recent violations of law by defendants. It still collects monthly from each road (including now the Pennsylvania and the New York, Ontario & Western) its anthracite tonnage transported from the mines, and in return makes to each a monthly report of the tonnage of all the others. (Ruley, 2 R., 55–57.)

Since November, 1900, it has collected from each of defendant railroad coal companies from month to

month the quantity of each size of coal sold by it at New York Harbor, f. o. b., and the price received, from which it computes the average price per ton received by each for each size of coal and the general average price of all for each size (Ruley, 2 R., 61–64, 89; Govt. Ex. No. 15, 3 R., 55; Govt. Ex. No. 11, 3 R., 38), which general average prices are the basis for ascertaining the price to be paid for coal purchased by the railroad coal companies from the independent operators under the 65 per cent contracts (*infra*, p. 66). Thus through a common agent defendant railroads and railroad coal companies are in position to know exactly how much anthracite their competitors are transporting, how much they are selling, and the prices they are receiving. (Thomas, 5 R., 1108, 1109.)

A striking illustration of the manner in which this Bureau has been and is used by defendants to prevent competition came out in the testimony of its chief. He admitted that in Brooklyn, always a highly competitive market, there was price cutting in 1901, and that thereupon the Bureau began and has since continued to collect monthly from each railroad coal company the amount of its sales of each size in that market and the prices received, compiling these into a table which has been sent monthly to each company, with the result that the discrepancies in the prices received by them at Brooklyn have dwindled to small proportions. (Ruley, 5 R., 982, 988–990, 998.) He further testified that—

> it is not necessary for any purpose relating to the prices of labor or to the prices for which coal is sold * * * to compile these figures to show the sales and receipts in Brooklyn. (5 R., 990.)

Again, in 1896, when the initial carriers agreed upon a division of the tonnage moving from the mines, it was through this Bureau that the attempt to carry out the agreement was made. (Harris, 2 R., 27, 28.)

The head of the Bureau always has been paid by the carriers, the coal producing companies contributing nothing to its support. (Jones, 2 R., 600; Ruley, 2 R., 56, 67.)

THE COMBINATIONS OF 1884–1887.

In December, 1884, The Philadelphia & Reading Railroad Company, then lessee of the Central Railroad of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, New York, Lake Erie & Western Railroad Company, predecessor of Erie Railroad Company, The New York, Susquehanna & Western Railroad Company, The Pennsylvania Coal Company, then controlling Erie & Wyoming Valley Railroad Company, The Delaware & Hudson Company, and Pennsylvania Railroad Company, entered into an agreement to pool amongst themselves in stated proportions the anthracite tonnage moving to competitive points for the period from January 1, 1885, to March 31, 1886. (Govt. Ex. No. 145, 3 R., 243–47.)

In March, 1886, the same companies agreed to a pool of the anthracite tonnage for the period from March 31, 1886, to March 31, 1887, and also agreed to advance the price of anthracite at New York 25 cents per ton. (Govt. Ex. No. 145, 3 R., 256–58.)

THE COMBINATION OF 1892 BETWEEN THE PHILADELPHIA & READING RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND LEHIGH VALLEY RAILROAD COMPANY AND THEIR COAL MINING COMPANIES.

In 1892 the Lehigh Valley Railroad and the Central Railroad of New Jersey were leased for a long term (the former directly and the latter through a controlled company) by The Philadelphia & Reading Railroad Company, and at the same time The Lehigh Valley Coal Company and The Lehigh & Wilkes-Barre Coal Company, a majority of whose shares were owned, respectively, by the two first-named railroads, made contracts to sell their output to The Philadelphia & Reading Coal & Iron Company, whose entire capital stock was owned by The Philadelphia & Reading Railroad Company (Ann. Rep., P. & R. R. R., 1895, 2 R., 566; Taylor, 2 R., 196), thus combining under one control the three principal carriers and producers of anthracite, together owning or controlling over 75 per cent of the total deposits. (Griffith, 2 R., 537.) The courts of New Jersey annulled the lease of the Central to The Philadelphia & Reading Railroad Company and the accompanying contract for the sale of the output of The Lehigh & Wilkes-Barre Coal Company to The Philadelphia & Reading Coal & Iron Company, on the ground, among others, that the combination thereby formed "tends to a disastrous monopoly in coal" which "portends the greatest danger to the public welfare." (*Stockton, Attorney-General,* v. *Central R. R. of New Jersey et al.,* 50 N. J. Eq., 52, 84, 491.) Following this decision the lease of the Lehigh Valley Railroad was rescinded in August, 1903. (Taylor, 2 R., 196.)

The general average prices at New York Harbor, f. o. b., of prepared sizes of anthracite in 1890 and 1891, just before this combination was formed, in 1892 and 1893, when most of the time it was in force, and in 1894 and 1895, following its dissolution, were as follows (Course of Wholesale Prices, Bul., Dept. Labor, No. 39, March, 1902, pp. 348–86):

Size.	1890	1891	1892	1893	1894	1895
Broken	$3.4858	$3.4433	$3.6152	$3.5628	$3.4172	$3.2833
Egg	3.6142	3.7508	3.9803	3.8520	3.3903	3.0296
Stove	3.7108	3.8542	4.1532	4.1931	3.6003	3.1264
Chestnut	3.3533	3.4758	3.9443	4.1673	3.5416	2.979

THE POOLING COMPACT OF 1896.

In 1896 the presidents of the anthracite carriers met and arrived at an agreement, or "understanding," as they prefer to call it, as to the proportion of the total anthracite tonnage each should transport, 20.50 per cent being allotted to the Philadelphia & Reading Railway, 15.65 per cent to the Lehigh Valley, 11.70 per cent to the Central of New Jersey, 13.35 per cent to the Delaware, Lackawanna & Western, 9.60 per cent to the Delaware & Hudson Company, 11.40 per cent to the Pennsylvania, 11.20 per cent to the Erie (including the New York, Susquehanna & Western and the Pennsylvania Coal Company), 3.10 per cent to the New York, Ontario & Western, and 3.50 per cent to the Delaware, Susquehanna & Schuylkill. (Harris, 2 R., 26–28; Ruley, 2 R., 88, 89, 101; Govt. Ex. No. 7, 3 R., 34; Walter, Govt. Ex. No. 159, 3 R., 377, 378; Thomas, 5 R., 1106.) These allotments came to be known as the "presidents' percentages." (Ruley, 2 R., 58, 88; Thomas, 5 R., 1070.)

Mr. Walter, formerly president of the Lehigh Valley Railroad, testified respecting this agreement as follows (Walter, Govt. Ex. No. 159, 3 R., 377):

> Mr. SHEARN. Changing the form of the question, then, was there during this period an understood arrangement between the presidents of the different companies as to the proportion of anthracite tonnage to be shipped over each of the railroads?
>
> Mr. WALTER. Yes.
>
> Mr. SHEARN. And when was that understanding arrived at; when was it reached?
>
> Mr. WALTER. Oh, I do not remember.
>
> Mr. SHEARN. Was that not in January, 1896?
>
> Mr. WALTER. I think it was; yes. I think so.

President Thomas, while making light of the compact, admitted that it was attempted and that he made some effort to observe it (Thomas, 5 R., 1077, 1079, 1107):

> Q. Did not each road get, at the end of each month, a statement of what every other road was doing?—A. I assume they did.
>
> Q. Your road did?—A. Yes.
>
> Q. And you made an effort to keep your tonnage substantially in harmony with your percentage?—A. I tried to keep within reason there.

Mr. Walter also admitted that he endeavored to observe it (Walter, Govt. Ex. No. 159, 3 R., 378):

> Mr. SHEARN. * * * Now, did you, so far as you were able, as president of the Lehigh Valley Railroad Company, do your best to live up to that understanding?
>
> Mr. WALTER. Yes.

Mr. Harris, president of the Philadelphia & Reading Railway in 1896, stated that the "understanding" continued in force as long as he remained president—until 1901. (Harris, 2 R., 26.) He also described its *modus operandi*. (Harris 2 R., 27, 28.)

THE 65 PER CENT CONTRACTS AND THEIR FORERUNNERS.

From an early period some independent producers disposed of their coal to the coal departments or subsidiary companies of the railroads over which their product moved to market. "We were educated that way," a pioneer operator explained, with perhaps unconscious felicity. (Richmond, 2 R., 269.) Inability to get cars as needed and high freight rates helped to educate them that way. (Richmond, 2 R., 269; Howe, 2 R., 214, 215, 225.) No doubt they were also influenced to some extent by the convenience of the arrangement.

At one time the railroads seem to have paid the operators only from 40 to 45 per cent of the tidewater price. (Sturges, 2 R., 281, 294.) The New York, Susquehanna & Western, entering the region in the early eighties, offered 50 per cent, which of course the others had to meet. (Sturges, 2 R., 281, 282, 310; Richmond, 2 R., 274.) There was another increase about 1890, forced by the competition of the New York, Ontario & Western, which came into the region in that year. (Sturges, 2 R., 282, 283; Richmond, 2 R., 269; Kerr, 5 R., 1043.)

In 1892, Mr. McLeod, president of The Philadelphia & Reading Railroad Company, then lessee of the Central of New Jersey and the Lehigh Valley, on

behalf of the coal companies of all three, offered to make with independent operators along their respective lines contracts for a period of seven years for the purchase of their output for 60 per cent of the average prices of prepared sizes at New York Harbor and a smaller percentage for steam sizes; and many such contracts were made. (Simpson, 2 R., 440, 441, 467; Fuller, 2 R., 481, 482; Henderson, 4 R., 553.) Other railroads, directly or through subsidiary companies, made similar contracts, excepting that the period varied, with independent operators tributary to their lines. (Simpson, 2 R., 440, 441, 467; Fuller, 2 R., 481, 482.) Under the operation of these contracts—known as 60 per cent contracts—on coal sold in the principal market, New York, the railroad or its coal company, after deducting from the price received the cost price, the expense of selling, and the loss from waste in transit—indeed, after deducting only the cost—would not have enough left to pay itself its published freight rates, and conversely by just that deficiency would the operator be better off than had he shipped his coal himself to New York and paid the published freight charges.

These results are worked out for 1892 and 1899, the first and last years of the 60 per cent contracts, in Tables I and II, Appendix A (*infra* pp. 372–373).

In 1899 many of the 60 per cent contracts made in 1892 were expiring. The secretary of the independent operators' association estimated at that time that the contracts then terminating would release an annual production of between eight and nine million tons. (Fleming, 2 R., 413, 417.) Claiming that the railroads had always absorbed for freight an undue pro-

portion of the price realized at tide (Cumming, 2 R., 358), the independents would not renew the contracts except for a better price at the mines. This was refused. The independents stood by their demands, continuing, however, pending the outcome, to sell their product to the railroads or the railroad coal companies at the old price. The controversy dragged on. An independent railroad from the coal fields to tidewater was threatened and its construction actually started (*infra*, pp. 93–94; 110–112). Meanwhile, in the early Fall of 1900, a general strike of the mine workers having intervened, the railroads and railroad coal companies, to effect a settlement, granted an advance in wages of 10 per cent, in which of course the independent operators had of necessity to join (Howe, 2 R., 220; Cumming, 2 R., 375; Fuller, 2 R., 486), still without any definite promise of a concession from the railroads or the railroad coal companies (Minutes of Meeting of Individual Operators held Oct. 5, 1900, Temple Iron Co. Ex. No. 7, 6 R., 30, 32; Kingsbury, 4 R., 371–73). This addition to the cost of production intensified the determination of the independents to get more for their coal. Previous to this time, furthermore, so far had the proposed new railroad progressed, that The Pennsylvania Coal Company, the largest producer outside the railroad circle, which had then taken charge of the project (*infra*, p. 110), began making contracts with other independent operators for the purchase of their coal at the mines for 65 per cent—an advance of 5 per cent—of the price at New York Harbor, to become effective when the road was completed. (Fuller, 2 R., 479, 480.)

The railroads and railroad coal companies were now ready to treat with the independent operators, so the latter on October 5, 1900, appointed—

> H. M. Howe, M. S. Kemmerer, and William Connell [a] committee with full power to adjust all differences with certain *transportation* companies, which shall have delegated full power to a committee, and negotiate and agree upon a basis of contract which shall definitely and for *a period of years* fix the commercial relations between the said operators and the said *transportation* companies. (Minutes Meeting of Individual Operators, held Oct. 5, 1900, Temple Iron Co. Ex. No. 7, 6 R., 30, 32.)

This committee, with J. S. McAnulty sitting as the representative of Mr. Connell, met, in a series of conferences, a committee representing the railroads and railroad coal companies, consisting of Mr. Baer, then counsel and director of Philadelphia & Reading Railway Company and shortly to become president thereof and of The Central Railroad Company of New Jersey, Mr. Truesdale, president of The Delaware, Lackawanna & Western Railroad Company, Mr. Walter and Mr. Garrett, president and vice president, respectively, of Lehigh Valley Railroad Company and its subsidiary coal company, and Mr. Thomas and Mr. Cumming, president and vice president, respectively, of Erie Railroad Company and The New York, Susquehanna & Western Railroad Company and their subsidiary coal companies. (Howe, 2 R., 213; McAnulty, 2 R., 315, 316.)

Prolonged parleying ensued. Finally an agreement was reached upon a form of contract which the rep-

resentatives of the independent operators recommended to their constituency as embodying, as one of them expressed it, "the best terms we could [get] from the railroads." (Howe, 2 R., 213, 214, 222, 224; McAnulty, 2 R., 315, 316; Cumming, 2 R., 358, 374–76.) A copy of it is attached to the petition as Exhibit A. (McAnulty, 2 R., 316, 317.)

It provides in its most important features (*a*) that the seller shall "deliver on cars at breaker to the buyer *all the anthracite coal hereafter mined from any of its mines* now opened and operated, or which it may hereafter open and operate on the premises intended to be covered by this contract, and any which shall be reclaimed from culm banks on said premises;" (*b*) "shipments to be made from time to time *as called for by the buyer*," the latter "to take the coal in as nearly equal daily or weekly quantities *as in its judgment the requirements of the market will permit*," with a promise that in calling for shipments the buyer will not discriminate, "but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer;" (*c*) "the buyer to use its best efforts to find a market for the seller's coal so as to enable the seller's collieries to be worked as many days as practicable, *with due regard to the general market conditions*, and to give orders for shipments which will enable the seller to work its collieries as many days in each year *as other collieries work similarly situated;*" and (*d*) the prices to be, "for all sizes above pea coal, 65 per cent of the general average free on board prices of said sizes [from the same trade region] received at tide points at or near New York, between Perth Amboy and Edge-

water;" "for pea coal, 50 per cent of the general average f. o. b. price for pea coal at said tide points at or near New York when the said price is $2.50 per ton or less, and for each advance of 10 cents per ton in the said f. o. b. price above $2.50 the proportion paid the seller shall be increased 1 per cent until the percentage paid for pea coal reaches 65 per cent;" "for buckwheat coal No. 1, 40 per cent of the general average f. o. b. price at said tide points at or near New York when the said price is $2.00 per ton or less, and for each advance of 10 cents per ton in the said f. o. b. price the proportionate price paid the seller shall be increased 2 per cent until the said f. o. b. price reaches $2.50, after which the proportionate price paid the seller shall advance 1 per cent for each 10 cents advance in the f. o. b. price above $2.50, as in the case of pea coal above mentioned;" "for all sizes smaller than buckwheat No. 1, 25 cents per ton f. o. b. railroad cars at breaker, and for each 10 cents increase in the general average f. o. b. price above $1.30 a ton at tide, the price shall be increased 5 cents per ton;" the aforesaid general average f. o. b. prices at New York Harbor of coal from each trade region to be computed by a disinterested expert accountant.

The Bureau of Anthracite Coal Statistics has compiled these prices from the beginning, November 1, 1900 (Ruley, 2 R., 63, 67), being paid by defendant railroads, not their coal companies the nominal purchasers (Ruley, 2 R., 57, 67).

The Delaware, Lackawanna & Western Railroad Company, The Lehigh Valley Coal Company, The Lehigh & Wilkes-Barre Coal Company, The Pennsylvania Coal Company, and Hillside Coal & Iron

Company each reports to the Bureau every month the tonnage of each size of coal shipped by it to New York Harbor from the Wyoming region and sold and the price received; and The Lehigh Valley Coal Company, Coxe Brothers & Company, and The Lehigh & Wilkes-Barre Coal Company make a similar report as to coal from the Lehigh region, and The Philadelphia & Reading Coal & Iron Company and The Lehigh Valley Coal Company as to coal from the Schuylkill region. (Ruley, 2 R., 61–65.) From these data the Bureau computes monthly the general average f. o. b. prices at New York Harbor of coal from each of the three regions upon which settlements under the 65 per cent contracts are made. (Ruley, 2 R., 61–65.) These prices from November, 1900, to September, 1908, appear in the record as Government Exhibit No. 15. (3 R., 55.) The shipments of the beforementioned companies constitute about 75 per cent of the total shipments to New York Harbor f. o. b. (Ruley, 2 R., 90.)

An important concession wrung from the independent operators by the railroad coal companies in return for the increased price was the provision that the contracts should run for the life of the mines, thus silencing forever those independents who entered into them. "It was the interest of the persons whom I represented," said Mr. Cumming, "to have the question settled once for all." (2 R., 358.) "The testimony shows," Judge Buffington found, "that the perpetuity clause was insisted on and inserted in the contracts thereafter by the combined action of the defendant railroads and their coal companies in order to withdraw from

competition for all time the freights of these producers." (1 R., 440.) The witness Simpson testified, and he was not contradicted, that the railroad coal companies refused to enter into contracts for the purchase of the product of the collieries in which he is interested unless they were made for the life of the collieries. (Simpson, 2 R., 447.)

Contracts in the agreed form, known as 65 per cent contracts, were subsequently from time to time made by the coal department or subsidiary company of each defendant railroad with independent operators along its line, as follows (2 R., 612; 2 R., 629; 2 R., 634; 2 R., 636; 2 R., 637; Govt. Ex. No. 170, 3 R., 418, et seq.):

Date.	Buyer.	Seller.	Premises Covered.	Production in 1907.
				Gross tons.
July 12, 1901	P. & R. C. & I. Co.	St. Clair Coal Co	St. Clair colliery and washery.	617,809
July 17, 1901	do	Enterprise Coal Co	Enterprise colliery	232,160
Aug. 17, 1901	do	Pine Hill Coal Co.	Pine Hill colliery	[1] 78,877
Oct. 15, 1901	do	E. White Co	Howard colliery	35,397
Mar. 12, 1902	do	Buck Run Coal Co	Buck Run colliery	184,031
				1,148,274
May 1, 1901	L. & W.-B. Coal Co.	Parrish Coal Co	Parrish and Buttonwood collieries.	556,901
Do	do	Red Ash Coal Co.	Red Ash collieries and washery.	229,585
June 1, 1901	do	Melville Coal Co.[2]		225,740
				1,012,316
Mar. 26, 1901	Lehigh Val. Coal Co.	Austin Coal Co	Austin colliery	37,785
June 24, 1901	do	Midvalley Coal Co.	Midvalley No. 2 colliery.	416,568
Do	do	Lentz & Co	Park No. 2 colliery	371,852
July 9, 1901	do	A. Pardee & Co	Cranberry and Chrystal Ridge collieries.	549,048
May 1, 1902	do	Raub Coal Co	Louise colliery	115,065
Mar. 29, 1906[3]	do	Harwood Coal Co	Harwood colliery	268,363
Do.[3]	do	Pardee Bros. & Co	Lattimer colliery	543,976
Apr. 3, 1908	do	Evans Colliery Co.	Culm bank	.....
May 23, 1908	do	Wm. H. McCauley	Crescent colliery	.....
				2,302,657

[1] Total production 236,630 tons, but only one-third covered by this contract. (Sturges, 2 R., 284.)
[2] Has no breaker of its own; output prepared at breaker of West End colliery.
[3] Differs from others in that term is not for life of mines, but expires July 1, 1909.

Date.	Buyer.	Seller.	Premises Covered.	Production in 1907.
				Gross tons.
Oct. 26, 1899	D., L. & W. R. R. Co.	People's Coal Co	Oxford colliery	217,956
Sept. 21, 1901	do	Clear Spring Coal Co	Clear Spring colliery and washery.	273,216
Mar. 11, 1903	do	Geo. F. Lee Coal Co	Chauncey colliery	67,281
May 1, 1907	do			
May 26, 1906	do	North End Coal Co	North End colliery	101,258
				659,711
Nov. 1, 1900[2]	Hillside C. & I. Co	Robertson & Law	Katydid colliery	68,526
Do	do	Green Ridge Coal Co	Green Ridge colliery	135,933
Feb. 2, 1901	do	Nay Aug Coal Co	Nay Aug colliery	13,091
Aug. 11, 1902	do	M. F. Dolphin (Brookside Coal Co.).	Brookside colliery	35,292
Apr. 14, 1904	do	Dolphin Coal Co., Ltd.	Dolph colliery	274,217
				527,059
Nov. 1, 1900[2]	N. Y., S. & W. Coal Co.	Jermyn & Co	Jermyn collieries and washeries.	353,122
	Grand total			6,003,139

[1] Cancelled May 17, 1909. (Robertson, 5 R., 1225.)
[2] Four contracts of same date.

The total output of all independent operators in 1907, including those located on railroads not defendants, was 16,875,795 tons. (Govt. Ex. No. 169, 3 R., 416.) Subtracting 981,956 tons mined by G. B. Markle & Company but marketed by The Lehigh Valley Coal Company under a long-term contract (Govt. Ex. No. 151, 3 R., 312), 425,855 tons mined by Kingston Coal Company but belonging to The Delaware, Lackawanna & Western Railroad Company (Govt. Ex. No. 72, 3 R., 153), and 1,960,028 tons purchased by railroads or railroad coal companies not defendant (Govt. Ex. No. 171, 3 R., 427), there remain 13,507,956 tons. The output of the collieries covered by 65 per cent contracts with the coal departments or subsidiary companies of defendant railroads was thus nearly half of this.

The coal departments or subsidiary companies of defendant railroads also purchase coal from year to year from independent operators along their lines not parties to 65 per cent contracts, paying the same

prices, however, as therein stipulated. Such purchases in 1907 were as follows (Govt. Exhibits Nos. 34, 48, 61, 72, 86, 3 R., 106, 122, 137, 153, 173):

Buyer.	Seller.	Purchased in 1907.
		Gross tons.
P. & R. C. & I. Co.	Excelsior Coal Co.	199,518
Do.	Mount Hope Coal Co.	853
Do.	Furnace Coal Co. (Gerber & Seaman)	50,672
Do.	Chas. D. Norton Co. (Brighton Coal Co.)	1,720
Do.	Chas. D. Norton Co. (Crystal Run Coal Co.)	261
Do.	Madeira Hill & Co. (Thomas Colliery Co.)	29
Do.	Est. A. S. Van Wickle	28
Do.	Irish Bros. (Buck Ridge Coal Co.)	1,667
Do.	Vinton Colliery Co. (Girard Mammoth Coal Co.)	55
		254,803
L. & W.-B. C. Co.	North American Coal Co.	16,120
Do.	Madeira Hill & Co.	2,228
		18,348
Lehigh Valley Coal Co.	Mill Creek Coal Co.	2,750
D., L. & W. R. R. Co.	Kingston Coal Co.	144,860
Do.	Carney & Brown	40,704
Do.	Mount Jessup Coal Co.	36,000
Do.	Elliott, McClure & Co.	22,791
		244,355
Hillside C. & I. Co.	Woodruff Bros.	108
Do.	Victor Coal Co.	633
		741
Grand total		520,997

It is a condition of the trade that a producer can not rely for the disposition of his coal solely upon markets at intermediate points between the mines and tidewater—line points as they are called—but must ship largely to the great distributing market at New York Harbor. (Fuller, 2 R., 483.) Much coal purchased under these contracts must, therefore, be shipped to New York Harbor for resale. In 1907 the amount was 3,342,933 gross tons. (Govt. Ex. Nos. 36, 50, 64, 74, 89, 2 R., 112, 126, 144–45, 158–63, 178.) The coal companies ship, of course, over the railroads by which they are respectively controlled.

The cost price of coal delivered in any month under the 65 per cent contracts is a stated percentage of the general average price for the month at New York

Harbor—in the case of prepared sizes 65 per cent. (*Supra*, pp. 65, 66.) These general average prices for the entire period since November 1, 1900, when the contracts took effect, are in evidence. (Govt. Ex. No. 11, 3 R., 38.) The selling prices received by the respective vendee railroad coal companies at New York Harbor and Philadelphia during the same period are also in evidence. (Govt. Ex. No. 15, 3 R., 55; Govt. Ex. No. 194, 3 R., 482.) The items, expense of selling at New York Harbor and waste from abrasion in transit, are also determined by the evidence, the former being about 10 cents a ton on prepared and 5 on small sizes and the latter about 5 cents a ton on prepared sizes only. (*Supra*, pp. 52, 53.) Whilst it is customary to load upon a car a small quantity of coal in excess of the weight purchased ("an allowance for waste" as it is described in the 65 per cent contracts), it is important to note that this is not an allowance to cover the waste from abrasion in transit, as alleged in the brief (p. 117) of the Lehigh Valley company in the court below, but to counterbalance the weight of water or ice in the car owing to the coal having been washed. (Henderson, 4 R., 590, 591; Brown, 4 R., 616; Phillips, 5 R., 921, 930; Grier, 5 R., 803; also see p. 53, *supra*.) The published freight rates to New York Harbor and Philadelphia are also in evidence. (Govt. Ex. No. 160, 3 R., 381–89; Ziegler, 2 R., 691–701.)

The record thus discloses all the factors necessary to work out the consequence of these contracts to any defendant railroad in respect of coal purchased thereunder by its coal company and resold at tidewater.

The consequence is that the railroad coal company, after deducting from the price received the cost price,

the expense of selling, and the loss from waste in transit—indeed, after deducting only the cost—would not have enough left to pay the freight to tidewater at the published rates. That is to say, anticipating for a moment the argument, the railroad owning the coal company would not have received its published rates for transporting the coal. (*Interstate Commerce Commission* v. *Chesapeake & Ohio R. Co.*, 200 U. S., 361.) Stating it from another angle, the independent operator who made a 65 per cent contract with the railroad coal company realized more than had he shipped his coal himself to either of the great tidewater markets, New York or Philadelphia, paying the published freight rates.

Tables III, IV, V, VI, and VII, Appendix A (*infra*, pp. 374–386), exhibit for the period from November 1, 1900, when the contracts took effect, to the end of 1901, the results per ton from the operation thereof in respect of coal purchased thereunder by The Lehigh Valley Coal Company and shipped over Lehigh Valley Railroad to Perth Amboy, New York Harbor, f. o. b. vessel; by The Lehigh & Wilkes-Barre Coal Company and shipped over the Central Railroad of New Jersey to Port Johnston, New York Harbor, f. o. b. vessel; by The Delaware, Lackawanna & Western Railroad Company, and shipped over its own railroad to Hoboken, New York Harbor, f. o. b. vessel; by Hillside Coal & Iron Company and shipped over Erie Railroad to Weehawken, New York Harbor, f. o. b. vessel; and by The Philadelphia & Reading Coal & Iron Company and shipped over Philadelphia & Reading Railway to Port Reading, New York Harbor, f. o. b. vessel.

Table VIII, Appendix A (*infra*, p. 386) shows the results per ton from the operation of the 65 per cent contracts in respect of coal purchased thereunder by The Philadelphia & Reading Coal & Iron Company and shipped to Philadelphia (Port Richmond) f. o. b. over Philadelphia & Reading Railway.

It thus appearing that at the time the railroad coal companies offered to make these 65 per cent contracts carrying higher prices but also placing the output of the vendor permanently in their control, an independent operator not making such a contract but maintaining his independence would sacrifice large amounts on shipments to New York Harbor and Philadelphia, the principal markets, the wonder is that any independents remain outside the railroad fold.

Whilst in consequence of the higher prices charged consumers, the railroad coal companies purchasing coal under the 65 per cent contracts realize to-day, on some sizes in some months of the year, from the resale of such purchased coal at New York Harbor, enough to pay the published freight rate, there is still a deficit on some sizes in all months and on the principal sizes in the months of April to August, inclusive.

Tables IX, X, XI, XII, and XIII, Appendix A (*infra* pp. 389–399) show for the year 1907 the results per ton from the operation of the contracts in respect of coal purchased thereunder by The Lehigh Valley Coal Company and shipped to New York Harbor over Lehigh Valley Railroad; by The Lehigh & Wilkes-Barre Coal Company and shipped to New York Harbor over the Central Railroad of New Jersey; by The Delaware, Lackawanna & Western Railroad Company and shipped to New York Harbor over its

own line; by Hillside Coal & Iron Company and shipped to New York Harbor over Erie Railroad; and by The Philadelphia & Reading Coal & Iron Company and shipped to New York Harbor over Philadelphia & Reading Railway.

Judge Lanning observed of the similar tables in the brief of the Government below, that they "were prepared under the direction of counsel and not verified by any witness" (1 R., 461), and that he was not satisfied that they "are free from error." (1 R., 462.) But all the basic facts and figures from which the tables are made up *are* in evidence; and it can not be necessary to prove by a witness mere multiplications and subtractions—that, for example, 35 per cent of $4.50, less 15 cents, is $1.425. As to the possibility of error in the tables, the underlying figures came from the defendants themselves. If there were any error it could only be in the multiplications and subtractions, which may be easily tested.

Nor can it be said that the appearance of these tables for the first time in the Government's brief left defendants no time to answer them, since they had that brief four weeks before filing their own. (1 R., 387, 388.) Furthermore, the petition expressly alleges that the 65 per cent contracts resulted as shown in these tables. Defendants could not, therefore, have been surprised by them.

Whilst the results have been worked out on each different size of coal for every month of the periods chosen and as to each of the companies separately, it was of course unnecessary to go so far into detail. The results in the case of any one company in a single month of each period and for the two or three most

largely used sizes are sufficient to show that the coal taken under these contracts has an advantage in the cost of transportation to tidewater.

To give further insight into the extent and gravity of the discriminations practiced by defendant railroads through the 65 per cent contracts, we have taken, in Table XIV, Appendix A (*infra*, pp. 400–401), a single one, that of June 30, 1902, between the Erie Railroad's coal company, Hillside Coal & Iron Company, and The Delaware & Hudson Company (Ans., D. & H. Co., 1 R., 154), and after ascertaining the results per ton on each size of coal from month to month in 1907, as in the preceding tables, by deducting from the price received the cost price, the cost of selling, the loss from wastage, and the freight, have applied such results to the total number of tons of each size purchased under such contract by Hillside Coal & Iron Company and shipped under a through rate over the Delaware & Hudson Railroad to Honesdale on the edge of the coal fields and thence over the Erie Railroad to New York Harbor (Weehawken) f. o. b., for resale; thereby obtaining the aggregate amount—$125,000, approximately—by which, in that one year alone, Hillside Coal & Iron Company failed to realize the amount of freight due the Erie Railroad; or stated from the other side, the aggregate amount realized by The Delaware & Hudson Company from this disposition of the coal in excess of the sum it would have realized had it shipped the coal to New York Harbor itself, as it did prior to the contract of June 30, 1902, and paid the published freight rate.

While the contract of June 30, 1902, between Hillside Coal & Iron Company and The Delaware &

Hudson Company expired March 31, 1908, the same course of dealing has since been continued on substantially the same terms under parol agreements. (Richardson, 2 R., 139.)

THE ACQUISITION BY READING COMPANY OF A MAJORITY OF THE SHARES OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

As before stated, Reading Company is a holding corporation which has owned since 1896 all the shares of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company. (*Supra*, p. 37.)

Philadelphia & Reading Railway Company succeeded the old Philadelphia & Reading Railroad Company in 1896 (*supra*, p. 35), and has since operated, as a part of its system, railroads from various parts of the Southern and Western Middle anthracite coal fields to tidewater at Port Richmond (Philadelphia) on the Delaware River and Port Reading on New York Harbor, over which anthracite and other freights move in continuous carriage (*Supra*, p. 23; Agreed Statement, 2 R., 608). As a corporation organized under the general railroad act of April 4, 1868 (2 R., 608), it has power to build branch lines into any other parts of the coal regions. (2 Pepper & Lewis' Dig. Pa. Laws, 3926.)

While admitting it to be a component part of a through route all under one ultimate control (Agreed Statement, 2 R., 609), we understand counsel to assert that that part of the line from Port Reading Junction to Port Reading, 20 miles, is not operated by Philadelphia & Reading Railway Company but by Port Reading Railroad Company, its nominal owner. As to that it is enough to say that the Port

Reading company was promoted in 1890 by The Philadelphia & Reading Railroad Company, which furnished it the money to build the road from Port Reading Junction to Port Reading expressly to secure an outlet to New York Harbor, and continued to own its capital stock until 1896, when, in the reorganization of the parent company, the same became vested, along with the capital stock of other subsidiary companies, in Reading Company, which is still the owner (Taylor, 2 R., 192, 193, 197, 199; Annual Report, P. & R. R. R., 1890, 2 R., 563; Agreed Statement, 2 R., 608, 609); and that the Port Reading company has always had the same corporate officers as the Philadelphia & Reading Railroad and Railway companies, who themselves have regarded the railroad of the Port Reading company as having been operated, practically, first by The Philadelphia & Reading Railroad Company, and since 1896 by Philadelphia & Reading Railway Company, the general superintendent of the latter testifying explicitly that the only service the Port Reading company performs is in local handling, switching, and unloading after the trains have been brought to the yard at Port Reading by Philadelphia & Reading Railway Company. (Dice, 4 R., 642; Harris, 2 R., 11; Henderson, 4 R., 572; Taylor, 2 R., 193.)

At Port Reading Crossing and Bound Brook Junction, respectively, points adjacent to Port Reading Junction, the Philadelphia & Reading Railway connects with the tracks of the Lehigh Valley Railroad and the Central Railroad of New Jersey, which extend thence to Jersey City, about 27 miles distant (Map of P. & R. System, 6 R., 134), and exchanges

some freight there with those two companies (Auch, 4 R., 668, 669, 677), having with the latter a perpetual agreement for a through route to Jersey City. (4 R., 528.) Also all passenger trains of the Philadelphia & Reading, destined to Jersey City, move from Bound Brook onward over the tracks of the Central.

The Philadelphia & Reading Railway has always been distinctively a carrier of anthracite. (Dice, 4 R., 645.) Of the total shipments thereof from the mines over all railroads in the calendar year 1907, 14,018,795 tons—20.89 per cent—moved over its lines (Govt. Ex. No. 14, 3 R., 53), and of its own total freight of 43,603,585 tons in the fiscal year ended June 30, 1908, 13,537,460 gross tons—about 33 per cent—consisted of anthracite, while in the same period, of its entire gross receipts of $32,080,198.07 from freight traffic, $13,026,030.58—about 41 per cent—were derived from shipments of anthracite (Govt. Ex. No. 21, 3 R., 91).

Of the total freight traffic originating on its lines in the same fiscal year, anthracite constituted 58.57 per cent. (Ziegler, 2 R., 705.)

The Philadelphia & Reading Coal & Iron Company is the largest owner and producer of anthracite, controlling, by its own estimate made in 1891, 50 per cent of all the unmined deposits, and 42.25 per cent according to Mr. Griffith's estimate made in 1896 (*supra*, p. 30), and producing in 1907, 12,304,608 tons—16.01 per cent—of the total output (Govt. Ex. No. 169, 3 R., 416).

Since long prior to January, 1901, it has sold its product in Philadelphia, Boston, New York, Buffalo, Chicago, Milwaukee, Minneapolis, Duluth, Baltimore, Washington, and other markets in the various

States, shipping it to destination over the Philadelphia & Reading Railway and connections. (Henderson, 4 R., 547–49; Ruley, 5 R., 993; Baer, 5 R., 1206, 1208; Agreed Statement, 2 R., 610.)

The Central Railroad Company of New Jersey has operated, as owner or lessee, since long prior to January, 1901, continuous lines of railroad from various parts of the Southern and Eastern Middle anthracite coal fields to Port Johnston, Elizabethport, and Jersey City, on New York Harbor (*supra*, p. 23; Agreed Statement, 2 R., 627, 628), and through one or another of its leased lines, organized under the general railroad act of April 4, 1868, has power to build branches to any other parts of the coal regions. (Agreed Statement, 2 R., 628; 2 Pepper & Lewis' Dig., Pa. Laws, 3926.)

Even more than the Philadelphia & Reading Railway it is predominantly an anthracite coal carrying road. Of the total shipments of anthracite from the mines in 1907, 8,714,113 tons—12.98 per cent—passed over its lines (Govt. Ex. No. 14, 3 R., 53), and of its own total freight in that year of 28,851,191 net tons, 9,434,108 net tons—about 33 per cent—consisted of anthracite, while in the same period that commodity contributed $9,753,871.41—about 48 per cent—of its gross freight receipts of $20,083,322.75. (Govt. Ex. No. 41, 3 R., 117.)

Of the total freight originating on its lines, 68 per cent is anthracite. (2 R., 652.)

As previously stated, it has owned for many years nine-tenths of the shares of The Lehigh & Wilkes-Barre Coal Company, one of the large owners and producers of anthracite (*supra*, p. 40), possessing together with The Lehigh Coal & Navigation Company, virtually a partner of The Central Railroad

Company of New Jersey (*supra*, p. 40), 17.30 per cent of the unmined deposits of anthracite (*supra*, p. 30), and producing in 1907, by itself, 4,451,033 tons, and with the Navigation Company, 7,629,049 tons—9.93 per cent—of the total. (Govt. Ex. No. 169, 3 R., 416.)

In January, 1901, and long prior thereto, The Lehigh & Wilkes-Barre Coal Company was engaged in selling its product in New York, New England, and other markets in various States of the East, shipping it to destination over the Central Railroad of New Jersey and its connections. (Heilner, 2 R., 119; Richards, 4 R., 705; Ruley, 5 R., 992, 993; Baer, 5 R., 1207, 1208.)

At Tamaqua, in the coal regions where one of its assembling and weighing yards is located, the Philadelphia & Reading connects with the Central of New Jersey. (Dice, 4 R., 652, 653.)

Not only do both extend from the anthracite fields to the same great tidewater market as above set forth; they are also in position to transport large tonnages from the same collieries.

The following collieries of independent operators, with their production in 1907 set opposite, are tributary to the lines of both the Philadelphia & Reading and the Central of New Jersey as shown by their own statements (Govt. Ex. No. 22, 3 R., 94; Govt. Ex. No. 42, 3 R., 117; Govt. Ex. No. 170, 3 R., 420, 422, 425):

Name of Colliery.	Name of Operator.	Production in 1907.
		Tons.
Coleraine	Estate A. S. Van Wickle	319,009
Kaska William	Dodson & Company	115,393
Maryd	Maryd Coal Company	135,157
		569,559

The collieries of The Lehigh Coal & Navigation Company in the Southern field, ten in number, with a production in 1907 of 3,178,016 tons (Govt. Ex. No. 169, 3 R., 416), are also tributary to both the Philadelphia & Reading and the Central of New Jersey. (Lathrop, 2 R., 45.) Neither reaches these collieries directly, but the Navigation Company owns and operates a gathering road, the Panther Creek Railroad, which serves all of its collieries and connects in the coal regions with the Philadelphia & Reading at Tamaqua and with the Central Railroad of New Jersey at Hauto, where it delivers tonnage to them. (Lathrop, 2 R., 45.) While the Central of New Jersey is the shortest and most direct route to New York Harbor for the output of the Navigation Company, there is no physical condition to prevent its moving to that market over the Philadelphia & Reading. Tamaqua, in fact, is one of the Philadelphia & Reading's assembling and weighing points for eastern shipments (Dice, 4 R., 652), and part of the coal which it transports to New York Harbor for The Philadelphia & Reading Coal & Iron Company comes by just as roundabout a course. As the president of the Navigation Company testified (Lathrop, 2 R., 46):

> Q. There is nothing to hinder you going that way [via Philadelphia & Reading to New York Harbor] if you wanted to, is there?—A. No, except the fact that there is no reason why we should.
>
> Q. If they should give you a less rate than the New Jersey Central you would go there very quick, would you not?—A. I think we would; yes, sir.
>
> Q. It is entirely possible to send all the freight from your collieries to the New York Harbor over the Philadelphia and Reading

Railroad, is it not?—A. Yes, sir; there is no physical reason why it should not be done.

Q. You would do it if you got a rate that was inducive to that end?—A. I think so, if there was nothing in the lease to prevent it.

Q. What proportion of the output of The Lehigh Coal & Navigation Company is sent to tidewater at New York?—A. I can not answer that. This is a round figure, I do not recall it, but I should say a little more than half of it.

The qualification, "if there was nothing in the lease to prevent it," has reference to the lease of the Lehigh & Susquehanna Railroad by the Central of New Jersey, in which the Navigation Company, the owner of the Lehigh & Susquehanna, covenants that not less than three-fourths of its output shall move over the Central of New Jersey and the leased line. This at all events leaves one-fourth of its output free. Beyond that, however, the relation between two railroads, each in position to transport a given tonnage, is not less competitive in law because one of them has a contract to transport the tonnage for a series of years.

The following collieries, with their production in 1907 set opposite, are located upon the Delaware, Susquehanna & Schuylkill Railroad (Smith, 2 R., 311; Govt. Ex. No. 169, 3 R., 416; Govt. Ex. No. 170, 3 R., 421, 423):

Name of Colliery.	Name of Operator.	Production in 1907.
		Tons.
Drifton	Coxe Bros. & Co.	
Eckley	do.	
Stockton	do.	1,394,265
Beaver Meadow	do.	
Tomhicken	do.	
Derringer	do.	
Oneida	do.	
Latimer	Pardee Bros. & Co.	543,976
Harwood	Harwood Coal Co. (C. Pardee & Co.)	268,363
		2,206,604

The following additional collieries, while not directly upon it, are very close by and could be served by it with the installation of short track connections (Smith, 2 R., 312; Govt. Ex. No. 170, 3 R., 422,425):

Name of Colliery.	Name of Operator.	Production in 1907.
		Tons.
Highland (2 collieries)	G. B. Markle & Co	565,506
Jeddo	do	416,450
Hazel Brook	J. S. Wentz & Co	135,332
		1,117,288

The Delaware, Susquehanna & Schuylkill is a short gathering road in the Lehigh region, the shares of which were owned by the Coxe Estate until acquired by Lehigh Valley Railroad Company in 1905. (Baird, 5 R., 735, 736.) By its connections it afforded the collieries from which it gathered coal a choice of routes to market. It connects with the Lehigh Valley Railroad at Drifton, Stockton, and one or two other points; with the Pennsylvania Railroad at Gum Run; with the Philadelphia & Reading Railway at Roan; and with the Central Railroad of New Jersey at Drifton, although within the past seven or eight years the Central has ceased to keep up the connection. (Smith, 2 R., 312–314.) The output of the collieries served by it and of the others which it was in a position to serve, might, therefore, have gone to New York Harbor and other markets over either the Philadelphia & Reading or the Central of New Jersey, among other lines. A practical illustration of how the Delaware, Susquehanna & Schuylkill Railroad intensified the competition naturally existing between the four beforementioned trunk lines with which it connected appears in the testimony of a witness for the defense. (Baird, 5 R., 780, 781):

> Q. * * * Do you know where the Coxe coal went, over what line it passed, after that occurrence?—A. Yes, sir.
>
> Q. Where did it go?—A. On the lines of the Lehigh Valley Railroad.
>
> Q. It was connected up with the Lehigh Valley, as you stated, at Lumber Yard or Stockton, and from that time passed principally over the lines of the Lehigh Valley Railroad?—A. Yes, sir.

In paragraph 3 of the agreement of May 29, 1883, between The Lehigh Coal & Navigation Company, The Central Railroad Company of New Jersey, and The Philadelphia & Reading Railroad Company, there is reference to still a further body of anthracite coal that could move to market over either of the two last-named roads. (3 R., 16.)

According to authoritative estimates (*supra*, p. 30), the anthracite deposits controlled by Reading Company and The Central Railroad Company of New Jersey will outlast by many years those of any other proprietor (Govt. Ex. No. 157, 3 R., 328), which means that before very long these two companies will control all the anthracite there is.

In January, 1901, Reading Company, the holding corporation heretofore described, owning the entire capital stocks of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company, acquired, at $160 per share, 145,000, a majority of the shares of The Central Railroad Company of New Jersey, which owned nine-tenths of the stock of The Lehigh & Wilkes-Barre Coal Company; raising the purchase money by issuing 60,353 first preferred shares, 34,275 second preferred shares, and $23,000,000 of bonds secured by a mortgage of the

purchased shares and certain shares of the Perkiomen and Port Reading Railroads. (Harris, 2 R., 34, 35, 36; Taylor, 2 R., 195; Baer, 5 R., 1186, 1187; Ann. Rep., Reading Co., 1901, 2 R., 567.)

J. P. Morgan & Company managed the deal (Harris, 2 R., 36; Thomas, 5 R., 1098), Mr. Thomas testifying that he was in Mr. Morgan's office just after it was closed, and that he, Morgan, said, "I have bought the Jersey Central for the Reading." Participating in the negotiations on behalf of Reading Company were a majority of its Executive Committee led by Mr. Baer. (Baer, 5 R., 1187.)

Reading Company receives the dividends paid upon these shares and directs their voting. (Taylor, 2 R., 195; Jersey Central Collateral Trust Deed of Reading Company, Sec. 2, Govt. Ex. No. 141, 3 R., 221.) Mr. Baer, president of Reading Company, Philadelphia & Reading Railway Company, and The Philadelphia & Reading Coal & Iron Company, was promptly elected president of The Central Railroad Company of New Jersey and The Lehigh & Wilkes-Barre Coal Company, and has remained such. (Ann. Rep., Reading Co., 1901, 2 R., 567; Govt. Exs. Nos. 39, 43, 3 R., 116, 118.) Three directors of the Central Railroad and the Lehigh & Wilkes-Barre company are also directors of Reading Company, Philadelphia & Reading Railway Company, and The Philadelphia & Reading Coal & Iron Company. (Govt. Exs. Nos. 17, 19, 23, 39, 43, 3 R., 88, 90, 96, 116, 118.)

In the annual report of Reading Company for 1901 it is stated that—

> through this acquisition the Reading system now owns and controls about 63 per cent of all the unmined anthracite coal in the State of Pennsylvania. (2 R., 567.)

THE ACQUISITION BY ERIE RAILROAD COMPANY OF A MAJORITY OF THE SHARES OF THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY.

Since prior to 1898 both Erie Railroad Company and The New York, Susquehanna & Western Railroad Company have possessed and operated railroads from the same general territory in the anthracite coal regions to Weehawken and Edgewater, respectively, on New York Harbor. (Cumming, 2 R., 359, 360; Richardson, 2 R., 129, 144; Thomas, 5 R., 1116; Map, Govt. Ex. No. 13.)

Even before the New York, Susquehanna & Western became a coal carrier it was, so far as developed, a competitor of the Erie, both operating trains from Middletown, New York, through Paterson and Passaic, New Jersey, to Jersey City. (Guyre, 4 R., 30; Johns, 4 R., 184, 185; Smith, 4 R., 238, 239.)

In 1882, supported by pledges of tonnage from independent operators in quest of better service and lower rates (Richmond, 2 R., 268, 270; Sturges, 2 R., 278, 281, 285), it pushed its line westward to Gravel Place, Pennsylvania, three miles northwest of Stroudsburg, there connecting with the Delaware, Lackawanna & Western Railroad; and in the same year constructed a short gathering line from certain collieries the tonnage of which it had secured, to a point of connection in the coal regions with the same railroad. (Johns, 4 R., 69, 70, 197, 360, 361.) It then began transporting coal to tidewater in conjunction with the Delaware, Lackawanna & Western as a connecting line, using the latter's terminal at Hoboken, as it had none of its own. (Johns, 4 R., 163, 197, 198, 361.)

The competition of the New York, Susquehanna & Western was felt at once. It reduced the proportion of the tidewater price taken for freight from 55 to 50 per cent, and the other railroads had gradually to follow suit. (Sturges, 2 R., 281, 282; Richmond, 2 R., 268, 274; Cumming, 2 R., 359, 378.) It was hampered, however, by not having its own line all the way to the coal fields and a terminal on New York Harbor.

It acquired these in 1893. In November of that year Wilkes-Barre & Eastern Railroad Company, the shares of which then as now were owned entirely by the New York, Susquehanna & Western, completed a railroad from Stroudsburg, the western terminus of the last named company, to Wilkes-Barre, 65 miles (Johns, 4 R., 70, 117, 165, 197; Cumming, 2 R., 361, 395, 396); and as a corporation organized under the general railroad act of April 4, 1868 (2 R., 636), it has power to build branch lines into any other parts of the coal region. (2 Pepper & Lewis' Dig. Pa. Laws, 3926.)

In the same year the New York, Susquehanna & Western completed a terminal at Edgewater, on New York Harbor, 5 or 6 miles north of Jersey City. (Johns, 4 R., 48, 49, 206; Smith, 4 R., 244.) Although primarily for coal, it was perfectly feasible to handle at this terminal other freight destined to or from New York (Johns, 4 R., 48, 53), and on equal terms, too, with Jersey City, after 1897, when Edgewater was brought within the established lighterage limits of New York Harbor. (Smith, 4 R., 224, 247, 248.)

In 1897 the New York, Susquehanna & Western constructed the Susquehanna Connecting Railroad

from a point on the Wilkes-Barre & Eastern, 11 miles east of Wilkes-Barre, to Minooka, 9 miles, to reach directly certain collieries the tonnage of which had theretofore come to it over the tracks of other roads. (Johns, 4 R., 198, 201, 361; Blauvelt, 2 R., 429; Cumming, 2 R., 361, 362.) With this improvement the company, in its annual report for the year ending June 30, 1897, announced to its stockholders that (2 R., 737):

> The completion of this road places your Company in an independent position in respect to the transportation of coal.

The entire road from Edgewater to the coal mines has always been operated by the New York, Susquehanna & Western as one system (Johns, 4 R., 207; Cumming, 2 R., 361; Richardson, 2 R., 129, 130, 147, 148), and anthracite has always been its chief traffic, contributing in 1897, 72.8 per cent, and in 1907, 66 per cent of its total freight receipts. (2 R., 737; Johns, 4 R., 65, 158, 209; Govt. Ex. No. 97, 3 R., 187.) The Wilkes-Barre & Eastern division was built indeed for the one purpose of reaching the mines. (Johns, 4 R., 199.) Up to 1898 the greater portion of the coal tonnage of the New York, Susquehanna & Western had always come to New York Harbor. (Johns, 4 R., 203.)

In 1898 and prior thereto the New York, Susquehanna & Western system connected in the coal measures with the Delaware & Hudson Railroad at Yatesville (Johns, 4 R., 70), with the Erie & Wyoming Valley Railroad at Hillside Junction (Johns, 4 R., 100, 101), with the Lehigh Valley Railroad at Jenkins Junction (Johns, 4 R., 199), and with the Central Railroad of New Jersey at Algonquin (Johns,

4 R., 200), and some coal from collieries located on those roads was shipped to market over the New York, Susquehanna & Western via these connections. (Johns, 4 R., 70, 199, 201.)

Further, in 1898, as now, the Erie Railroad drew its large anthracite tonnage from three main sources; first, collieries on its own Jefferson Division; secondly, collieries of The Delaware & Hudson Company on the Delaware & Hudson Railroad, which did not reach New York Harbor; and thirdly, collieries of The Pennsylvania Coal Company on the Erie & Wyoming Valley Railroad (Cumming, 2 R., 362, 363, 371, 382, 394), a gathering road only, the stock of which, now owned entirely by the Erie, was then owned, 49 per cent by the latter and 51 per cent by The Pennsylvania Coal Company. (Cumming, 2 R., 394; Bosman, 2 R., 488.) The tonnage it received from the Delaware & Hudson and the Erie & Wyoming Valley came upon its line at Honesdale and Hawley, respectively, points of connection just outside the coal measures. (Cumming, 2 R., 363; Map, Govt. Ex. No. 13.)

In 1898, therefore, as now, as its superintendent admitted, the New York, Susquehanna & Western was in position to transport to tidewater the large output of The Delaware & Hudson Company's collieries and of those of The Pennsylvania Coal Company on the Erie & Wyoming Valley Railroad (Johns, 4 R., 200, 201, 202, 204, 205), which, as just stated, then went over the Erie Railroad, constituting two of the three principal sources of its anthracite traffic.

Not only was it in position to transport this tonnage; the facts are that in 1898, 1899 and 1900, large quantities of coal from the mines of The Delaware & Hudson Company did move to eastern markets over

the New York, Susquehanna & Western (Johns, 4 R., 97, 98), and that since 1901 still larger quantities from The Pennsylvania Coal Company's collieries and others on the Erie & Wyoming Valley Railroad, including several controlled by Hillside Coal & Iron Company, have been shipped to market, principally to tidewater, over the New York, Susquehanna & Western via Hillside Junction (Johns, 4 R., 106–113), showing conclusively that these large bodies of tonnage could be transported to tidewater over the last named road quite as well as over the Erie. The only change at Hillside Junction between 1898 and 1901 was the addition of 4,430 feet of storage tracks at a cost of $11,821.19. (Johns, 4 R., 113.)

That some of The Pennsylvania Coal Company's collieries are tributary to both roads was admitted by the witness Blauvelt, an officer of both. (2 R., 430.) And from a statement prepared by the witness Richardson, vice president of both, showing the assembling points, routes, etc., of coal of The Pennsylvania Coal Company and Hillside Coal & Iron Company, it appears that coal from the following collieries owned or controlled, or whose output is owned or controlled, by those companies, having a combined production in 1907 of 3,412,319 tons (Report, Dept. of Mines of Pa., 1907, pp. 131, 132, 133, 163, 164), may be shipped to New York Harbor over either the Erie or The New York, Susquehanna & Western, namely: No. 14 Ewen, No. 6, No. 9, Barnum, Central, Old Forge, Consolidated, Butler, Susquehanna Washery, Jermyn No. 1, Jermyn No. 2, and Brookside. (Richardson, 2 R., 136–138.)

The only member of the Circuit Court to discuss this branch of the case, Judge Lanning, found that in

1898 these roads were competitors in the transportation of anthracite coal. (1 R., 445.)

Erie Railroad Company has owned the entire capital stock of Hillside Coal & Iron Company since 1895 and The New York, Susquehanna & Western Railroad Company has owned a majority of that of The New York, Susquehanna & Western Coal Company since the same year. (*Supra*, pp. 43, 44.) Both these companies are owners of coal lands. (*Supra*, p. 29.) The latter, however, unlike the former, produces no coal, although it purchases large quantities from independent operators. (May, 4 R., 284; Blauvelt, 2 R., 432; Govt. Exs. Nos. 102, 103, 104, 3 R., 189, 190, 192.) In 1898 and prior thereto both were shipping anthracite coal to New York Harbor, selling it in competition. (Cumming, 2 R., 360, 389; Blauvelt, 2 R., 432, 435; Ruley, 5 R., 991–93.)

With this the situation, at a stockholders' meeting of the Erie, held March 11, 1898, it was decided by vote of all the shares to propose to the stockholders of the New York, Susquehanna & Western that they exchange their shares in that road for shares in the Erie "upon the terms and conditions agreed upon between the Erie Railroad Company and the New York, Susquehanna & Western Railroad Company." (Govt. Ex. No. 153, 3 R., 319; Bosman, 2 R., 487.) The proposal having been made (Govt. Ex. No. 154, 3 R., 322; Bosman, 2 R., 487), pursuant thereto shareholders of the New York, Susquehanna & Western exchanged their shares in that company for shares in the Erie until on June 30, 1898, the latter had acquired 122,463 shares of the common and 128,440 shares of the preferred stock of the former, out of a total issue of 130,000 shares of each kind

(Bosman, 2 R., 488), thus bringing the two roads and their respective subsidiary coal companies—Hillside Coal & Iron Company and The New York, Susquehanna & Western Coal Company—under one control.

The managements of the respective companies have become completely merged. The two railroads have exactly the same executive officers and all but two of the thirteen directors of the Susquehanna are also directors of the Erie. (Govt. Exs. Nos. 76, 95, 3 R., 168, 186.) Likewise, the two coal companies have exactly the same executive officers and all the directors of The New York, Susquehanna & Western Coal Company are directors or officers of Hillside Coal & Iron Company. (Govt. Exs. Nos. 80, 99, 3 R., 170, 187.) Not long after 1898 the former stopped shipping the coal it purchased from independents to New York Harbor and other markets and instead turned it over to the Hillside company for the same price it paid. (Blauvelt, 2 R., 435, 436.)

THE COMBINATION THROUGH THE TEMPLE IRON COMPANY OF DEFENDANT RAILROADS AND THEIR COAL COMPANIES AND HEREIN OF THE DEFEAT OF THE PROJECTED NEW YORK, WYOMING AND WESTERN RAILROAD.

For long prior to 1898 the independent operators had complained of the high freight rates (Howe, 2 R., 212, 214; Cumming, 2 R., 358; Fleming, 2 R., 409, 415); and they maintained an organization, the "Anthracite Coal Operators' Association," expressly to fight for lower rates from the railroads or, what was the same thing, higher prices from the railroad coal companies. (Howe, 2 R., 212, 214, 221; Fleming, 2 R., 406, 407, 409.) They were even more in the power of the railroads than is usually the case, as the larger shippers, who would naturally bear the brunt of a

contest with the railroads, were here, in reality, the the railroads themselves, and therefore interested in keeping the rates high, for whatever beyond a fair charge they paid as shippers, they got back as carriers, while the excess tolls collected from other shippers were so much clear gain.

As a last resort the independents in the Northern field resolved to construct a new route to tidewater, and to that end in May, 1898, the New York, Wyoming & Western Railroad Company was organized in Pennsylvania, with a capital stock of $1,000,000, to build a railroad from a point on the Susquehanna River within or near Pittston, Luzerne County, in the Northern coal field, to a point on the Delaware River opposite or near Belvidere, New Jersey, where it would have connected with the lines to tidewater of the Delaware, Lackawanna & Western, the Central of New Jersey, the Lehigh Valley, and the Pennsylvania. (Sturges, 2 R., 285, 286; Charter, N. Y., Wyo. & Western R. R., Temple Iron Co. Ex. No. 10, 6 R., 46.)

The time was auspicious, for in the following year an independent tonnage of between eight and nine millions which had been tied to the existing railroads or their coal companies under the so-called 60 per cent contracts would become free by their expiration. (*Supra*, p. 62; opinion of Buffington, J., 1 R., 429.)

E. B. Sturges, a large operator, who had successfully promoted the entrance of the New York, Susquehanna & Western and the New York, Ontario & Western into the coal regions, was elected president of the new company. (Sturges, 2 R., 278, 279, 285.) Besides him its principal supporters were Simpson and

Watkins, with a production in 1898 of 1,302,579 tons, of which about 500,000 were free—that is, not bound to the existing roads; Jones and Williams, Connell Coal Company, Jermyn and Company, J. N. Rice, M. S. Kemmerer, E. L. Fuller, O. S. Johnson, W. G. Payne, L. A. Watres, Reece G. Brookes, and Clinton W. Wisner, independent producers, who pledged tonnage to it and subscribed to its capital stock. (Sturges, 2 R., 286, 287; Law, 2 R., 326.)

Surveys of the route had been made, a small portion of the right of way acquired, and several thousand tons of steel rails purchased (Sturges, 2 R., 286), when the project was halted by a bold stroke of the defendant railroads.

Simpson and Watkins, supporters of the new railroad, controlled through stock ownership eight collieries in the Northern field—Wyoming region—with a combined production in 1898 of 1,302,579 tons, namely: Northwest colliery, No. 5 on the map (Govt. Ex. No. 13, 3 R.), 4 miles northwest of Carbondale, owned and operated by Northwest Coal Company; Edgerton colliery, No. 18, 2 miles east of Mayfield, owned and operated by Edgerton Coal Company; Sterrick Creek colliery, No. 25 1-2, 9 miles north of Scranton, owned and operated by Sterrick Creek Coal Company; Babylon colliery, unnumbered but between Nos. 81 and 100, 7 miles south of Scranton and 3 miles north of Pittston, owned and operated by Babylon Coal Company; Mount Lookout colliery, No. 107, 2 miles south of Pittston, owned and operated by Mount Lookout Coal Company; Forty Fort and Harry E. collieries, Nos. 151 and 152, 7 and 8 miles south of Pittston, respectively, owned and operated by Forty Fort Coal Company; and Lackawanna colliery, No. 32, 5 miles

north of Scranton, owned and operated by Lackawanna Coal Company, Limited. (Law, 2 R., 323–326.) The shares of these several companies, all corporations except the last named, which is a limited partnership, were nearly all owned by Simpson and Watkins, who, although working together, were not strictly copartners except in conducting stores at the mines. (Simpson, 2 R., 438.)

These collieries, the defendant railroads, acting in combination, proceeded to detach from the support of the projected railroad, using as their instrument The Temple Iron Company, a corporation of Pennsylvania.

Negotiations for the acquisition of the collieries were opened with Mr. Simpson by Robert Bacon, of J. P. Morgan & Company, at the office of H. McK. Twombly, Mills Building, New York. (Simpson, 2 R., 442, 443.) Others present were J. Rogers Maxwell, then president of the Central of New Jersey, and Mr. Thomas, then president of the Erie and the New York, Susquehanna & Western. (Simpson, 2 R., 445.) Mr. Baer, then a director of the Philadelphia and Reading Railway (Govt. Ex. No. 182, 3 R., 441), and Francis Lynde Stetson, also represented the railroads in the matter. (Thomas, 5 R., 1118, 1119.) Mr. Simpson named his price, $5,000,000 (Simpson, 2 R., 442, 459; Law, 2 R., 505, 506); and although he declined to permit a technical examination to be made of the properties it was agreed to. (Simpson, 2 R., 442.)

In 1898 The Temple Iron Company was doing a small iron business at Temple on the Philadelphia & Reading Railway, with a capital stock of $240,000 and assets of $71,519.25. (Law, 2 R., 326, 344.)

Mr. Baer was its president and a large shareholder. (Law, 2 R., 328, 339; Baer, 5 R., 1191.)

January 26, 1899, its capital stock was increased to $2,500,000 and at about the same time it issued bonds to the amount of $3,500,000. (Law, 2 R., 327, 512, 513, 518.) February 27, 1899, by prearranged plan (Ans., Reading Co., 1 R., 49), Simpson and Watkins conveyed to it the capital stocks of the companies holding title to the collieries they had agreed to sell at the conference in Mr. Twombly's office, taking in payment $2,260,000 of its capital stock and $3,500,000 of its bonds. (Contract, Simpson & Watkins and Temple Iron Co., Govt. Ex. No. 162, 3 R., 391.) On the same day they transferred this stock and $2,100,000 of the bonds to Guaranty Trust Company of New York as trustee, receiving $3,238,396.66 in cash and certificates of beneficial interest in $1,000,000 of the stock (Contract, Simpson & Watkins and Guaranty Trust Co., Govt. Ex. No. 165, 3 R., 403), the trustee purchasing from Mr. Baer at the same time, for $151,603.34, the remaining shares of the iron company of the par value of $240,000, its original capital. (*Ibid.*, 3 R., 404; Law, 2 R., 518.)

Still on the same day and as part of the same transaction, Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, severally contracted with Guaranty Trust Company and The Temple Iron Company, in writings of identical form, to purchase from the former at par 29.96 per cent, 17.12 per cent, 22.88 per cent, 19.52 per cent, 5.84 per cent, and 4.68 per cent,

respectively, in all 100 per cent, of the capital stock of the latter, and to guarantee the same percentages of its funded debt, principal and interest (Contracts, Temple Iron Co., Guaranty Trust Co. and Railroads, Govt. Ex. No. 163, 3 R., 393; Govt. Ex. No. 164, 3 R., 398; Stip., 2 R., 583); the contracts further providing that in any period of six months in which the earnings of The Temple Iron Company should be insufficient to meet the appropriation for sinking fund, interest on its bonds, and a so-called "stock reserve" charge, the guarantor companies should pay to the trustee up to 12½ cents on every ton of coal transported by them during the period from the mines of the company, and that any remaining deficiency should be made up by the guarantor companies in the proportions in which they purchased the stock. (Govt. Ex. No. 163, sec. 3rd, 3 R., 395; Govt. Ex. No. 164, sec. 3rd, 3 R., 400; Stip., 2 R., 583.)

April 12 of the same year each such company so purchasing shares in The Temple Iron Company and guaranteeing its debt entered into a supplementary contract with Guaranty Trust Company to enable the latter—

> to take such action as may be necessary to enforce the terms of guarantee and the other covenants of said agreement of 27th of February, 1899, so as to work out equitable results and protect and safeguard the rights and obligations of * * * the several guarantors in the event of the failure of * * * any one or more of the guarantors to comply with the terms of any such guarantee and to keep and perform the covenants in any such agreement. (Contracts, Guaranty Trust Co. and Railroads, Govt. Ex. No. 167, 3 R., 406; Govt. Ex. No. 168, 3 R., 411; Stip., 2 R., 583.)

$2,100,000 of the bonds and $1,500,000 of the certificates of beneficial interest in the stock of The Temple Iron Company were underwritten by a syndicate composed of J. P. Morgan, H. McK. Twombly, William Rockefeller, George F. Baker, James Stillman, Drexel & Company, and Guaranty Trust Company. (Contract between Guaranty Trust Co. and syndicate subscribers, Govt. Ex. No. 166, 3 R., 405.)

This *coup* crippled the New York, Wyoming & Western Railroad and led to its abandonment. (Sturges, 2 R., 288, 289, 298.)

That the defendant railroads (Reading Company standing for Philadelphia & Reading Railway) combined in the matter, and that their objects among others were, first, to kill the projected road, and second, permanently to apportion the tonnage from the collieries in question among the roads then transporting it on the basis theretofore prevailing, thereby withdrawing it from competition, is admitted; Mr. Thomas, then president of the Erie and the New York, Susquehanna & Western, and now president of the Lehigh Valley, testifying as follows (Thomas, 5 R., 1090, 1091):

> A. * * * Simpson & Watkins, who were shippers on the line of the Erie and Lehigh Valley roads, as well as the Ontario and Western——
>
> Q. The Lackawanna also?—A. Yes, they were shippers on the Lackawanna. They were, as usual, dissatisfied with the rates, thought they should have lower ones. We declined to lower the rates; they were reasonable. They got a lot of tonnage together, their own and that of other shippers, and threatened to

build another road to the Delaware River opposite Easton.

* * * * *

Q. You understood at that time that the Simpson & Watkins properties and those that were associated with them were seeking a market?—A. I did.

Q. And that the tonnage that was then tributary to the Erie Railroad might get away from it to some other railroad?—A. There was every prospect that it would.

Q. To either an existing railroad or some new railroad?—A. Yes.

Q. And it was the possibility of the loss of that tonnage that induced you to go in, as an officer of the Erie Railroad, to the Temple Iron Company transaction?—A. It was.

Q. And to protect the Erie Company?—A. Yes, sir.

Q. As to the Lehigh Valley, what were the motives that caused the Lehigh Valley to go into it?—A. I do not know what their motives were, but I assume they were the same as mine. Part of the mines were on their lines, and I assume that they wanted to retain the tonnage they had. Somebody would have bought those properties, and it was better to buy them jointly and allow the tonnage to go to the roads that had formerly carried it than otherwise.

Q. Was the result of that operation to continue the tonnage of the collieries on the roads where that tonnage had been before?—A. That was its practical result, and it has never been disturbed.

The testimony before the Interstate Commerce Commission of Mr. Walter, president of the Lehigh Valley in 1898 and 1899, now dead, is to the same effect. (Govt. Ex. No. 159, 3 R., 370–71,

372–73, 374–75.) We quote but a few lines (3 R., 371, 374):

> Mr. SHEARN. One of the things threatened was the building of this railroad?
>
> Mr. WALTER. Yes, sir.
>
> Mr. SHEARN. That was one of the things you wanted to avoid?
>
> Mr. WALTER. Yes; we wanted to avoid that.
>
> * * * * *
>
> Commissioner PROUTY. Was there more than one of these Temple collieries that could be reached by more than one railroad?
>
> Mr. WALTER. Yes, sir; oh, yes; there were three or four railroads up there, and they could have been reached by those—yes, sir; they could have been reached.
>
> Commissioner PROUTY. And it was your understanding that if you went into this agreement and put through the Temple Iron arrangement that you were not to reach out after this coal, but it was to be left as it was and was to go in the future as it had in the past, and what had gone to the Lehigh Valley would continue to go to the Lehigh Valley, and what had gone to the Central Railroad of New Jersey would continue to go to the Central Railroad of New Jersey?
>
> Mr. WALTER. Yes.
>
> Commissioner PROUTY. You were not to invade each other's territory?
>
> Mr. WALTER. That is the idea.

The testimony of Mr. Truesdale, president of the Delaware, Lackawanna & Western, as far as it goes, is also to the same effect. (5 R., 1134.)

Vice President Kerr, of the New York, Ontario & Western Railway, which was invited to join the combination, but declined, in a bill filed at Scranton by his company to restrain the tonnage of one of the

Simpson and Watkins collieries from being diverted from its line to the Erie in alleged violation of a contract, thus stated under oath the purpose of the combination, which statement he confirmed on the stand in the present case (Kerr, 2 R., 171, 172):

> That during the winter of 1899 the plaintiff was requested to join certain other railroad corporations engaged in the transportation of anthracite coal, namely [the present defendant railroads], *in a plan to buy up certain collieries owned by so-called "individual operators," and in that way not only control a larger percentage of the coal mined, but defeat the construction of any new line;* but the plaintiff declined to enter into any such combination. [Italics ours.]

Following the acquisition of the Simpson and Watkins collieries by The Temple Iron Company, contracts were made by it, or one or another of its aforesaid subsidiaries (in place of existing short term contracts), selling, for the *life of the mines* to the coal department or subsidiary company of each defendant railroad transporting coal from the said collieries the output, in whole or in part, of the same collieries whose output, in whole or in part, it was transporting at the time such roads became associated in The Temple Iron Company (Law, 2 R., 328, 335, 498; Thomas, 5 R., 1092, 1093), thereby assuring that the tonnage from these collieries would never again be the subject of competition or a source of support to any independent railroad.

A schedule of such contracts follows:

(1) The Temple Iron Company and The Lehigh Valley Coal Company, dated September 20, 1901, covering the output of three collieries, Forty Fort, Mount Lookout, and Babylon;

(2) The Temple Iron Company and Hillside Coal & Iron Company, dated———, covering the output of Sterrick Creek Colliery;

(3) The Temple Iron Company and Hillside Coal & Iron Company, dated July 1, 1901, covering part of output of Northwest Colliery;

(4) The Lackawanna Coal Company, Limited, and The Delaware, Lackawanna & Western Railroad Company, dated August 27, 1901;

(5) The Lackawanna Coal Company, Limited, and Hillside Coal & Iron Company, dated October 21, 1903;

(6) The Mount Lookout Coal Company and The Delaware, Lackawanna & Western Railroad Company, covering part output of Mount Lookout Colliery;

(7) Edgerton Coal Company and The New York, Susquehanna & Western Railroad Company, Erie Railroad Company and Lehigh Valley Railroad Company, dated February 5, 1902, covering output of Edgerton Colliery. (Law, 2 R., 328, 335, 498; Ans., The Temple Iron Co., 1 R., 129; Ans., Lackawanna Coal Co., Ltd., 1 R., 289, 290, 291, 297; Ans., Mount Lookout Coal Co., 1 R., 223.)

On account of the inferior quality of the coal the purchase price in the last contract is 60 per cent of the tidewater selling price instead of 65 as in the others.

While Mr. Simpson now says that he had no faith in the proposed independent road, he admits that the other subscribers, including his partner, Mr. Watkins, thought they could build it. (Simpson, 4 R., 215.) And besides the tonnage of a dozen other supporters (*supra*, p. 94) there had been pledged to it, according to the witness Sturges's estimate, some 500,000

tons annually of the output from the collieries of Simpson and Watkins not under contract to existing roads (Sturges, 2 R., 287), which amount alone was as much as the New York, Ontario & Western had when it built its line into the coal regions in 1890. (Kerr, 5 R., 1045.)

At all events the good faith of the enterprise is not questioned, and that it was regarded seriously enough by the defendants, is shown by the testimony of their presidents (*supra*, pp. 98–101), the despatch and vigor with which they went about strangling it, and the powerful banking support they received.

The proportions in which the stock of The Temple Iron Company were taken and its obligations guaranteed by the confederated roads are of themselves highly significant. If the percentage which the anthracite tonnage of each bears to that of all six be ascertained for each of the five years immediately preceding the transaction, 1894 to 1898 (Govt. Ex. No. 161, 3 R., 390), and such percentage of each for each year be added together and averaged by dividing by five, the result will be substantially the percentage of the stock of The Temple Iron Company that each agreed to buy and of its obligations that each agreed to guarantee. Mr. Baer admitted that the distribution was in proportion to the anthracite tonnage of the respective roads, although his recollection was that the figures for only the preceding year were taken, rather than the average for five years. (Baer, 5 R., 1193.) In either case the principle was the same and speaks for itself. A movement on foot threatened the monopoly of the confederates. Having determined upon a method of strangling the new project, how should they distribute the burden?

Naturally, in proportion to the interest of each; in the ratio that the tonnage of each bore to the tonnage of all.

They have continued to own the shares of this corporation in the same proportions, except that Reading Company has transferred a part of its holdings to its subsidiaries, Reading Iron Company and The Philadelphia & Reading Coal & Iron Company. (Govt. Ex. No. 107, 3 R., 194; Baer, 5 R., 1222, 1223.)

Excepting Reading Company, all the confederated corporations operate railroads in the locality of the mines acquired by The Temple Iron Company from Simpson and Watkins and the output thereof could be shipped to market over either. (Simpson, 2 R., 445; Thomas, 5 R., 1118.) It is, of course, not meant that each road has lateral tracks of its own running into all of the collieries, but rather that each comes into the immediate region, and where the tracks of one do not extend all the way to a particular colliery of the group it can reach it over the lateral tracks of some other road, or if necessary (which it seldom would be) build its own lateral connections. (Simpson, 2 R., 445.) They are and were, therefore, natural competitors for this particular traffic; as, indeed, is freely admitted. (Thomas, 5 R., 1118; Walter, Govt. Ex. No. 159, 3 R., 374, 375.)

President Thomas of the Lehigh Valley—president of the Erie and the New York, Susquehanna & Western in 1898 and 1899—testified as follows (5 R., 1117, 1118):

> Q. Who suggested the plan of having the Temple Iron Company buy out Simpson & Watkins?—A. I do not know who suggested it. I did all I could to have the Simpson &

Watkins property purchased, because I wanted to retain to the Erie Railroad the business that she had heretofore enjoyed from that property. I thought that bunch of tonnage might become mighty attractive to somebody to enter that field, and some of my competitors might have bought that property and taken that tonnage away from me. If I had had money or credit I would not have asked any help. I would have taken it alone.

Q. Who were your competitors [the witness was at that time president of the Erie and the New York, Susquehanna & Western] you were afraid of?—A. The Lehigh Valley might have taken it; the Lackawanna might have taken it; the Jersey Central could have reached it.

Q. Where was the coal from the Simpson & Watkins collieries moving at that time?—A. Moved over all of those roads.

Q. Where? To what point?—A. All over, wherever they could find a market for it.

Q. Was it coming to tidewater?—A. Some of it came to tidewater. Some of it went West, to different points.

The output of these collieries, which had grown to 2,053,824 tons in 1907 (Govt. Ex. No. 169, 3 R., 416), has always moved in interstate commerce. Prior to 1892, when they began selling all their coal to the railroad coal companies, Simpson and Watkins themselves shipped part of it to the principal markets, New York, Oswego, Buffalo, where their chief competitors were the railroad coal companies (Simpson, 2 R., 438–40, 469, 470), and since then, also, this coal in large part has been habitually transported in interstate commerce. (Thomas, 5 R., 1118; Simpson, 2 R., 470; Ans., Temple Iron Co., p. 10.)

New York Harbor has always been its principal market. (Simpson, 2 R., 470.)

In 1899, 1900, and 1902, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, The New York, Susquehanna & Western Railroad Company, The Central Railroad Company of New Jersey, and Reading Company contributed $483,000 to The Temple Iron Company to make up deficits in its earnings, the roads which transported coal from its collieries (being the three first named) contributing up to 12½ cents a ton on the tonnage transported, and the remaining deficit being made up by all the companies in the proportions in which they held the stock, as provided in the beforementioned agreements of February 27, 1899. (Law, 2 R., 333, 334, 520, 521.) On direct examination Mr. Law, vice president and treasurer of The Temple Iron Company, testified explicitly that this sum had not been repaid and was not even carried on the books as an obligation. (2 R., 334.) Several days later, in answer to counsel for his company, he stated that it was treated as a loan to be repaid with interest. (2 R., 521.) It subsequently developed in the examination of Mr. Thomas that the sum was repaid two or three weeks prior to the close of the defendants' testimony. (Thomas, 5 R., 1119.)

But The Temple Iron Company was planned to be something more than the instrument to defeat an independent railroad and pool a given tonnage.

Its directory is constituted of the presidents of Reading Company, Philadelphia & Reading Railway Company, The Central Railroad Company of New

Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, and two or three figureheads seldom present. (Law, 2 R., 328, 336, 354; Govt. Ex. No. 156, 3 R., 326.) They meet, not at the office of The Temple Iron Company, but at that of Mr. Baer, president of the Central Railroad of New Jersey, 143 Liberty Street, New York. (Law, 2 R., 336.)

Its executive committee, vested with all the powers of the directory, is composed of the managing officers of the railroad coal companies. (Law, 2 R., 350.)

Mr. Baer, president of the Reading system, has been its president except from 1899 to 1900, when he was vice president and Mr. Watkins, of Simpson and Watkins, president. (Law, 2 R., 354, 513.)

The minutes of the directors disclose the following entries:

Meeting held June 27, 1899 (Law, 2 R., 345):

> After considering the proposition to establish a statistical bureau in New York for the purpose of keeping records of all matters of interest to the anthracite coal companies, the quantities to be mined each month, the prices, and so forth, it was, upon motion of Mr. Maxwell, seconded by Mr. Thomas, unanimously resolved,
>
> That the questions embodied in the suggestions as to a bureau of statistics and disposition of surplus coal be referred to a committee of three, of which the president shall be chairman, to report on the practicability of the suggestions, and, if found practicable, to report a detailed plan.

Meeting held June 27, 1900 (Law, 2 R., 349):

> On motion of Mr. Baer, duly seconded, the appointment of an executive committee, consisting of the following-named persons, and with the powers hereinafter specified, was ratified by the board of directors, as follows:
>
> The Temple Iron Company, with the approval of the Erie Railroad Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, and The Central Railroad Company of New Jersey, have appointed W. A. May, of the Erie Railroad Company; W. A. Lathrop, of the Lehigh Valley Railroad Company; E. E. Loomis, of the Delaware, Lackawanna & Western Railroad Company; W. J. Richards, of The Central Railroad Company of New Jersey, an executive committee.

The members of this committee are in no way connected with The Temple Iron Company, but are officers technically of the railroad coal companies and in reality of the railroads, as the phraseology of the resolution recognizes. (Law, 2 R., 350.)

Meeting held July 2, 1901 (Law, 2 R., 346):

> Resolved, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell, and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent rate to outside shippers, or a flat rate, and, if so, what rate.

"Outside shippers" were independent operators not selling their coal to the railroad coal companies but marketing it themselves. (Law, 2 R., 346; Cumming, 2 R., 371.) No member of this committee was connected with The Temple Iron Company; they

were operating officers of the railroads or railroad coal companies. (Cumming, 2 R., 370.)

Meeting of July 30, 1901 (Law, 2 R., 347):

> A letter from Mr. J. B. Dickson was presented, requesting consideration of certain conditions affecting the sale of coal at Boston and vicinity, but the consensus of opinion was that it was not within the province of The Temple Iron Company to act upon questions of this character.

Meeting of September 17, 1901 (Law, 2 R., 348):

> A communication from Messrs. Dickson & Eddy relative to the 5 cent differential was presented by Mr. Fowler, and the following motion was adopted:
>
> Moved and seconded that the communication of September 12, 1901, from Messrs. Dickson & Eddy, addressed to and presented to the meeting by Mr. Fowler, relative to the 5 cent differential, be referred to the sales agents to investigate and report.

"The 5 cent differential" is the difference between the price of anthracite at the upper and lower ports of New York Harbor. (*Supra*, p. 51.) The sales agents were those of the railroad coal companies, as The Temple Iron Company had none, its coal being sold at the mines.

Meeting of October 8, 1901 (Law, 2 R., 348, 349):

> The president presented a letter from Mr. W. W. Ruley, wherein he asked for extra compensation, stating that, owing to the increase in the services required of him, the present allotment was inadequate.
>
> On motion, duly carried, the question was referred to Mr. Baer, with power to act.

Mr. Ruley was not in the employ of The Temple Iron Company and it made no payments to him. (Law, 2 R., 349, 492.) He was, however, employed by defendant railroads and their subsidiary coal companies to keep a record of the shipments of coal and the average prices at tidewater upon which settlements were made under the 65 per cent contracts (Ruley, 2 R., 55, 67), and for other purposes.

THE ACQUISITION OF THE PENNSYLVANIA COAL COMPANY BY ERIE RAILROAD COMPANY AND HEREIN OF THE DEFEAT OF THE PROJECTED DELAWARE VALLEY AND KINGSTON RAILROAD.

In 1899, after the Simpson and Watkins collieries had been bought by defendant railroads jointly through The Temple Iron Company, and the New York, Wyoming & Western Railroad had in consequence been practically abandoned, the movement for a new road from the anthracite mines to tidewater was continued with The Pennsylvania Coal Company in charge. (Sturges, 2 R., 288.)

That company was the most powerful of the independents. Its production in 1899 was about 2,000,000 tons. It owned a majority of the stock of the Erie & Wyoming Valley Railroad, a gathering line extending from numerous mines, principally its own, to Hawley, a point of connection with the Erie system. (Fuller, 2 R., 474-477; Thomas, 5 R., 1085,1120,1122.)

It proposed to extend the Erie & Wyoming Valley Railroad from Hawley eastward to Lackawaxen, on the boundary between Pennsylvania and New York, and caused the Delaware Valley & Kingston Railroad Company to be organized in New York to construct a line across that State from Lackawaxen to Rondout on the Hudson, making a continuous independent route

from the mines to tidewater. (Fuller, 2 R., 474–477; Thomas, 5 R., 1085; Cumming, 2 R., 390.)

President Thomas, then of the Erie, testified that—

> they were threatening and had started to build a *competing* road to the Hudson River. (Thomas, 5 R., 1120.)

At a meeting on November 22, 1899, the "Anthracite Coal Operators' Association," the organization of the independents, pledged "constant support and active assistance" to the new road, reciting that—

> the independent operators and the general public are now largely at the mercy of existing railroad companies, which charge unreasonable rates for their services, owing in part to the large amounts for which the said companies have been capitalized,

and that

> it would be highly advantageous to all the independent owners of coal properties throughout the entire anthracite region of Pennsylvania to have the railroad connection now proposed completed as speedily as possible,

and

> equally desirable in the interests of the people of the State of New York, and the public in general * * * since it will necessarily result in a material reduction of the price paid for anthracite coal by consumers. (Fuller, 2 R., 475, 476.)

Under the New York law a new railroad could not be built unless certified to be necessary by the railroad commission. After full hearing, several railroads appearing in opposition, the commission in April, 1900, unanimously certified that the Delaware Valley & Kingston Railroad was necessary and their decision

was affirmed by the courts on appeal. (Cumming, 2 R., 389–391; Fuller, 2 R., 474; Kerr, 5 R., 1045, 1064; *People ex rel. Erie R. R. Co.* v. *Board of R. R. Comrs. and Del. Val. & Kingston Ry. Co.*, 54 App. Div., 615.)

Thereupon the bed of the abandoned Delaware and Hudson Canal, from Lackawaxen to the Hudson River, was purchased for a roadbed, and terminal facilities were acquired at Kingston or Rondout, from where coal could be sent by river or one of the connecting railroads to New York Harbor or north to Albany. (Fuller, 2 R., 477; Cumming, 2 R., 390, 391.)

Mr. Fuller, principal promoter of the Delaware Valley & Kingston Railroad and himself a large operator, testified that a majority of the independents in the Wyoming region would have shipped their product over the new road, being enabled to do so by the expiration in 1899 or 1900 of their contracts with the existing railroads or railroad coal companies; and The Pennsylvania Coal Company by itself produced a tonnage of 2,000,000 tons. (Fuller, 2 R., 474, 477.)

President Thomas, when asked if The Pennsylvania Coal Company were able to build this road, replied (5 R., 1120):

> They were, absolutely.

It is admitted that if built it would have been a competitor of the existing roads. (Thomas, 5 R., 1120, 1121.)

But the Delaware Valley & Kingston Railroad was never built.

Pursuant to an arrangement between the officers of Erie Railroad Company and J. P. Morgan & Company, the latter purchased, or made agreements

to purchase, the capital stock of The Pennsylvania Coal Company and along with it the capital stock of Erie & Wyoming Valley Railroad Company and of the new Delaware Valley & Kingston Railroad Company (Thomas, 5 R., 1085, 1086; Govt. Ex. No. 155, 3 R., 323), paying for all $28,000,000 (Fuller, 2 R., 485).

Whereupon, January 10, 1901, the directors of Erie Railroad Company, in a communication to the holders of certificates of beneficial interest in its shares (the shares themselves being still held by the voting trustees, Mr. J. P. Morgan, Mr. Louis Fitzgerald, and Sir Charles Tennant), announced that (Bosman, 2 R., 487; Govt. Ex. No. 155, 3 R., 323, 324):

> Messrs. J. P. Morgan & Co., at the request of your officers, now have offered to sell to the Erie Railroad Company all of the capital stock of the Erie and Wyoming Valley Railroad Company and of the Delaware Valley and Kingston Railroad Company, and all of the capital stock of the Pennsylvania Coal Company, being not less than a majority thereof, acquired or to be acquired by them, in such manner that, in exchange and payment therefor, they shall receive 50,000 shares of the first preferred stock of the Erie Railroad Company, and also $32,000,000 par value of the gold bonds of this company, bearing 4 per cent interest, and payable in fifty years; * * *.
>
> At its meeting held on the tenth day of January, 1901, the board of directors of the Erie Railroad Company by the affirmative vote of every member present (not including any of the members of Messrs. J. P. Morgan & Co.), resolved that for the purposes of the Erie Railroad Company it was desirable to accept the

> offer of Messrs. J. P. Morgan & Co. and to conclude such purchase of the stock of the Pennsylvania Coal Company and of the Erie and Wyoming Valley Railroad Company and of the Delaware Valley and Kingston Railroad Company upon the terms of such offer; it being understood that the $5,000,000 first preferred stock to be issued to Messrs. J. P. Morgan & Co. will be issued in the form of voting trust certificates under the terms of the plan of reorganization of the former New York, Lake Erie and Western Railroad Company.

Subsequently, Erie Railroad Company acquired, upon the terms and conditions stated in this communication, the entire capital stock of the three companies in question. (Bosman, 2 R., 488.)

Thus was another competitive railroad from the coal fields crushed in its inception.

Further, in January, 1901, Hillside Coal & Iron Company, owned by Erie Railroad Company, and The Pennsylvania Coal Company, were two of the largest producers of anthracite, which they shipped principally over the Erie Railroad to New York Harbor, Buffalo, and other markets in and outside Pennsylvania and there sold in competition. (Ruley, 5 R., 992, 993.) Since the acquisition of the shares of The Pennsylvania Coal Company by Erie Railroad Company it has been managed by the same officers and has had the same selling agents as Hillside Coal & Iron Company. (Govt. Ex. No. 80, 3 R., 170; Govt. Ex. No. 81, 3 R., 170; Peters, 2 R., 160, 589.)

Finally, the acquisition of The Pennsylvania Coal Company, with a production of 2,404,554 tons in 1901 and 4,246,663 tons in 1907 (Govt. Ex. No. 169, 3 R., 416–17), gave the Erie nearly an absolute monopoly

of the anthracite coal tributary to its lines. Thus, in 1907, of the total anthracite tonnage transported by it and its controlled lines, 96.14 per cent was shipped by coal companies whose every share it owned (*Supra*, p. 48).

THE ABSORPTION IN RECENT YEARS BY LEHIGH VALLEY RAILROAD COMPANY OF INDEPENDENT COAL PRODUCERS ALONG ITS LINE, CULMINATING WITH THE ACQUISITION OF COXE BROTHERS & COMPANY (INC.) AND THE DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD

In a typical month of 1898 The Lehigh Valley Coal Company contributed 40.8 per cent of the total shipments of anthracite over the Lehigh Valley Railroad. (Baird, 5 R., 774.) In 1908 The Lehigh Valley Coal Company and companies which had become affiliated with it mined and produced 85.69 per cent of the anthracite transported by the Lehigh Valley Railroad. (Baird, 5 R., 775.)

Between 1900 and 1905 the Lehigh Valley Railroad purchased the shares of Connell Coal Company, Seneca Coal Company, Warrior Run Coal Company, Wyoming Coal and Land Company, and Righter Coal Company, owners and producers of anthracite coal tributary to its line, and merged them into The Lehigh Valley Coal Company. (Baird, 5 R., 768, 781, 782; Govt. Ex. No. 60, 3 R., 137.)

In October, 1905, it acquired from the Coxe estate the entire capital stock of Coxe Brothers & Company, $2,910,150, par value, and of Delaware, Susquehanna & Schuylkill Railroad Company, $1,500,000 par value, and $60,000 of the stock of certain water companies, all for $19,000,000, which it raised by issuing bonds secured by a mortgage of the purchased shares. (Baird, 5 R., 736, 737; Ann. Rep. L. V. R. R., 1906, 2 R., 571.)

Coxe Brothers & Company possesses over 5,000 acres of anthracite coal-bearing lands (Govt. Ex. No. 59, 3 R., 136), and in 1905 was the largest independent operator left, producing 1,314,534 tons. (Govt. Ex. No. 170, 3 R., 419.) In common with The Lehigh Valley Coal Company, among other competitors, it was shipping coal to New York Harbor and other markets throughout the country. (Ruley, 5 R., 992, 993; Baird, 5 R., 769.)

The Delaware, Susquehanna & Schuylkill Railroad is a gathering line with fifty miles of tracks in the Lehigh region, connecting the collieries of Coxe Brothers & Company and others in the same locality with the Lehigh Valley Railroad, the Pennsylvania Railroad, the Philadelphia & Reading Railway, and the Central Railroad of New Jersey. (Baird, 5 R., 735–37; Smith, 2 R., 312–14.)

The collieries it served were (Smith, 2 R., 311; Govt. Ex. No. 169, 3 R., 416; Govt. Ex. No. 170, 3 R., 421, 423):

Name of Colliery.	Name of Operator.	Production in 1907.
		Tons.
Drifton	Coxe Bros. & Co	
Eckley	do	
Stockton	do	
Beaver Meadow	do	1,394,265
Tomhicken	do	
Derringer	do	
Oneida	do	
Latimer	Pardee Bros. & Co	543,976
Harwood	Harwood Coal Co. (C. Pardee & Co.)	268,363
		2,206,604

Others which it could serve with the installation of short track connections were (Smith 2 R., 312; Govt. Ex. No. 170, 3 R., 422, 425):

Name of Colliery.	Name of Operator.	Production in 1907.
		Tons.
Highland (2 collieries)	G. B. Markle & Co	565,506
Jeddo	do	416,450
Hazel Brook	J. S. Wentz & Co	135,332
		1,117,288

The business of Coxe Brothers & Company is now carried on by officers and directors who are also officers and directors of The Lehigh Valley Coal Company (Govt. Ex. No. 58, 3 R., 135), and its entire output is turned over to the latter at the mines. (Agreed Statement, 2 R., 634.)

The Delaware, Susquehanna & Schuylkill Railroad is now operated by Lehigh Valley Railroad Company. (Skeele, 2 R., 234; Baird, 5 R., 737.)

The president and secretary of Lehigh Valley Railroad Company frankly disclosed that its purpose was to monopolize the production of coal along its line in order to prevent competition for the tonnage (Thomas, 5 R., 1087; Baird, 5 R., 781, 782); and that it is fast attaining its end is seen from the fact that the proportion under its control has increased from 40.8 per cent in 1898 to 85.69 in 1908.

THE PURCHASE OF SHARES OF THE LEHIGH VALLEY RAILROAD BY THE OTHER DEFENDANT RAILROADS IN COMBINATION.

In 1901, Reading Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company and Erie Railroad Company, defendants, and Lake Shore & Michigan Southern Railway Company, holder of $30,332,500 of the capital stock of Reading Company, acting in combination, purchased or agreed to purchase at the instigation of J. P. Morgan & Company, $1,000,000, $1,600,000, $1,850,000, $1,850,000, and $5,700,000, respectively, in all $12,000,000—about 30 per cent—of the capital stock of the defendant Lehigh Valley Railroad Company, a competitor of the beforementioned defendants in the production, sale, and

transportation of anthracite coal. (Baer, 5 R., 1217, 1218; Truesdale, 5 R., 1149; Loomis, 2 R., 580; de Forest, 2 R., 582; Blauvelt, 2 R., 584; Govt. Ex. No. 52, 3 R., 130.) All the purchasers did not take title to the stock at the same time, apparently, but the agreement to purchase was admittedly made in unison. (Baer, 5 R., 1217, 1218; Truesdale, 5 R., 1149.) Mr. Baer thus described the transaction (5 R., 1217):

> After talking that over with a number of gentlemen, Mr. Morgan being anxious that it should be done, I came over to Philadelphia, and saw Mr. Stotesbury, and suggested that he see the trustees of the Packer estate and of the college—the Lehigh University had an interest in it. We agreed to buy the stock. Then we divided it up between the four systems. I insisted that the Lake Shore and the Vanderbilt System, which was the strong system, should take a big block of the stock, and the rest of us should not be loaded down, because I did not know whether we could save the Lehigh Valley. We bought the stock, and we went into the Executive Committee, and we had to change presidents, because he threatened then to throw the road into receivership unless we did all sorts of things that we could not see fit to do. Then we got Mr. Thomas, of the Erie, to come in, and we have managed it along now for ten years until we have demonstrated the ability of the Lehigh Valley to take care of itself, so that its stock is at great price in the market.

Thereafter, Mr. Thomas, who had been president of the Erie and the New York, Susquehanna & Western, was elected a director and president of the Lehigh Valley; Mr. Baer, president of Reading Company and the

Central of New Jersey, became a member of its board of directors and executive committee; and J. Rogers Maxwell, George F. Baker and H. McK. Twombly, officers or directors of one or another of the purchasing companies, also became directors of the Lehigh Valley. (Baer, 5 R., 1217; Baird, 5 R., 772; Govt. Ex. No. 184, 3 R., 447.)

The Erie Company thus declared its purpose in the transaction (2 R., 577):

> An opportunity having been presented to your board to secure an interest in the stock of the Lehigh Valley Railroad Company, and believing that it would promote generally a better understanding and greater harmony between the managements of the two companies, as well as ultimately return a profit upon the investment, it was deemed wise to make such a purchase.

And since all acted in concert the others must have had a like purpose.

FIXING THE PRICE IN 1902.

After the strike in 1902, defendants The Philadelphia & Reading Coal & Iron Company, The Lehigh & Wilkes-Barre Coal Company, The Lehigh Valley Coal Company, The Delaware, Lackawanna & Western Railroad Company, Hillside Coal & Iron Company, and The Pennsylvania Coal Company put into effect in the same month, October, a uniform schedule of monthly prices, about 50 cents a ton higher on the average than before, for the prepared sizes of anthracite coal at New York Harbor, as follows: For the broken or grate size, $4.75 per ton, and for egg, stove, and chestnut, $5.00 per ton, at Edgewater, Hoboken, Weehawken, and Port Liberty, the terminal points

nearest the City of New York; and at Port Johnston, Elizabethport, Port Reading, and Perth Amboy, the terminal points farther away, 5 cents a ton less, to equalize the difference in the water freight to New York, subject to the customary discount on each size of 50 cents a ton in April, 40 cents in May, 30 cents in June, 20 cents in July, and 10 cents in August, reaching the full price again in September. (Govt. Exs. Nos. 172, 177, 178, 179, 180, 3 R., 428, 433, 434, 435, 436; Baer, 5 R., 1178; Truesdale, 5 R., 1151; also *supra*, p. 51.)

It is proved that the prices of these companies were advanced to this uniform level following consultations among their presidents; that each knew in advance what the prices of the others would be; and that the prices of all were put into effect at the same time.

Thus, President Truesdale testified (5 R., 1145–47):

> Q. But when was the last general change in the circular price of coal which was to run until it moved again?—A. I think that was right after the strike of 1902.
>
> Q. Who fixed those prices?—A. I think the officers of our Coal Sales Department, in consultation with me, did that.
>
> Q. Whom did you consult with?—A. I did not consult anybody.
>
> Q. Did you not know that the other railroads were all going to have the same price?—A. I think I had general knowledge of that.
>
> Q. You and these other railroad Presidents all consulted about those prices?—A. I do not know whether we had any special consultation on that matter. Of course, we had general knowledge of what each would do.

Q. How did you get that general knowledge?—A. I do not know. There are various ways of getting it.

Q. You knew what the Reading was going to do?—A. I think we did.

Q. And the Reading knew what you were going to do?—A. Yes, sir.

Q. You knew what the Lehigh Valley was going to do, and so on with the other railroads that were concerned?—A. It is not very different from the knowledge we all have as respect to freight rates.

Q. Your freight people meet together, when any change is contemplated, and you consider amongst yourselves what shall be done?—A. We generally do; yes, sir.

* * * * *

Q. Now, then, these coal rates have been fixed in substantially the same way, have they?—A. Well, somewhat the same way. There is no association, there is no organization, there is no one like a chairman or any one who can call a meeting.

Q. But there are not many and it is not hard to get you together?—A. No.

Q. This last schedule of rates was fixed in 1902, as I understand you, and was fixed as the result of such a conference as you have described?—A. I can not state now whether there was any special conference held at that time on that subject.

Q. Everybody put out the same price at the same time?—A. They did; yes, sir.

Also President Thomas (5 R., 1113):

Q. When did you last establish those prices?—A. I do not recollect. There has not been any change, particularly in prices, since the last time, when our friend John Mitchell and

his esteemed political compatriots succeeded in doing what we could not do—get up the price of coal.

Q. After this interference, as you say, by Mitchell, how was the price of coal fixed?—A. I do not know, when you come to that, how it was fixed. I presume likely there was some consultation as to what we were going to do.

Q. Between whom?—A. The various parties in interest, I suppose.

Q. Who were they?—A. The various coal-carrying companies, or the various coal producers. I think there was consultation with individual operators as to what coal ought to be in consideration of the great advance in cost of producing.

Q. There was a general consultation?—A. No; there was not any general consultation.

Q. Whom did you consult with about it?—A. I do not recollect now. I think probably I consulted with Mr. Baer; very likely I asked Mr. Truesdale what he was going to do. I know I asked Mr. Walter what he was going to charge for coal.

The price schedule thus established in 1902 has been in force ever since, save in April, 1906, when the companies uniformly omitted the customary discount. (Govt. Exs. Nos. 172, 177, 178, 179, 180, 3 R., 428, 433, 434, 435, 436.)

Pea and smaller sizes, being used principally for steam purposes, are necessarily sold in competition with bituminous coal, over which defendants have no control. It was for that reason, no doubt, and also because they are not generally sold from month to month, but under contracts running for a year (Ruley, 5 R., 993; Thomas, 5 R., 1125), that no attempt apparently was made to fix a uniform price

for them when the prices of the other sizes were raised in October, 1902. Mr. Baer testified that it was for the former reason that The Philadelphia & Reading Coal & Iron Company did not include such sizes in its new price schedule established at that time. (5 R., 1178.) The broken or grate size is likewise sold for steam purposes in competition with bituminous coal, and consequently, like the small sizes, is sold principally under yearly contracts (Ruley, 5 R., 993; Thomas, 5 R., 1125; Henderson, 4 R., 605, 606); and therefore, although listed in the published price schedules, is not governed by them in practice. (Henderson, 4 R., 605, 606.)

THE PROFIT IN MINING ANTHRACITE COAL.

Anthracite is not sent to market as it comes from the collieries, but goes first to the breaker, where it is broken and screened into the customary sizes, "grate" (or "broken"), "egg," "stove," and "chestnut," known as prepared or domestic sizes, and "pea," "buckwheat No. 1" (or "buckwheat,"), "buckwheat No. 2" (or "rice"), and "buckwheat No. 3" (or "barley"), which, being used almost entirely for steam purposes, are called steam sizes. "Grate" is used for steam as well as domestic purposes, while "pea" is coming more and more into domestic use. (Rep., Strike Com., Bul., Dept. Labor, No. 46, pp. 449, 450; Ruley, 2 R., 62; "The Production of Coal in 1907," p. 172, U. S. Geolog. Survey.) Two distinct processes are thus involved—the mining proper and the preparation of the raw material into the defined sizes.

Of course, as the mining proceeds from the thicker and nearer seams to the thinner and deeper lying ones, it requires more labor, more materials, more

machinery to get the coal out. Again, prices of materials rose appreciably between 1898 and 1908, the years which defendants chose for comparison. In that time, also, wages were twice increased. (Rep., Strike Com., Bul., Dept. Labor, No. 46, pp. 457, 474, 477, 478, 481, 482, 497, 498.)

On the other hand large savings and economies have been effected through continual progress in the methods of mining, including improvements in machinery already in use, the substitution of machinery for hand labor, and the consolidation of groups of small collieries so that one breaker may take the place of several. (May, 4 R., 288, 289, 346, 347.)

The problem, therefore, is to balance against the factors making for a higher cost of production those making for a lower. (May, 4 R., 313.)

Higher wages and shorter working hours do not necessarily mean more expensive mining, as they may be offset by a consequent increase in the efficiency of labor. In the present case, indeed, it is proved that the average number of tons mined by each man per day was 7.16 in 1907, as compared with 7 in the fiscal year ended June 30, 1902, before the last wage increase and reduction in the hours of labor was made. (Temple Iron Company Exs. Nos. 1, 2, 3, 4, 5, 6, 6 R., 20–27.)

It is admitted that much labor-saving machinery has been introduced in recent years, especially in the preparation of anthracite. The witnesses refer to some of the more important instances. (Norris, 4 R., 422, 424, 428, 432; May, 4 R., 288, 289, 313, 315, 346, 347.) Defendants' witness Norris testified that the improved methods of preparation have so far over-

come the conditions tending to increase the cost of the process that the net cost is now only "a little higher" than ten years ago. (4 R., 424.)

But the most important economies consist, first, in saving and sending to market the smaller sizes which would formerly have been thrown upon the waste banks; secondly, in redeeming from the waste banks and sending to market the vast quantities of these sizes which had been thrown away in times past; and, thirdly, in making it possible to win an increasingly larger proportion of the coal in the ground by leaving less for pillars, supports, etc.

FIRST. Prior to 1885 the buckwheat, rice, and barley coal which we know to-day was a waste product. (May, 4 R., 347, 348; Stevenson, 4 R., 509.) About 1885 buckwheat began to be saved, and the saving of rice and barley followed, approximately, in 1897 and 1899, respectively. (May, 4 R., 347; Stevenson, 4 R., 508, 509; Thompson, 5 R., 976; P. & R. and Erie Ex. No. 8, 6 R., 380.) The saving of buckwheat we dismiss as anterior to the period covered by our comparison.

Since 1901—our figures do not go back further—the total tonnages of rice and barley saved and shipped to market, including both that freshly mined and that redeemed from the waste banks, have been as follows: In 1901, 3,705,066 tons; in 1902, 3,592,570 tons; in 1903, 5,513,726 tons; in 1904, 5,904,448 tons; in 1905, 6,586,614 tons; in 1906, 7,083,746 tons; and in 1907, 9,177,541 tons. (Govt. Ex. No. 14, 3 R., 47.) Of these shipments, 2,625,444 tons in 1906 and 2,973,178 in 1907 were redeemed from the waste banks by washeries (2 R., 709, 710), leaving 4,458,302 in 1906 and 6,204,363 in 1907 of freshly mined rice and barley saved and shipped to market instead

of being thrown away as would have been done prior to 1897 in one case and 1899 in the other. For the years before 1906 the shipments from washeries are not divided in the record so as to show the sizes below buckwheat No. 1 separate from the rest. (2 R., 709.) The value at the mines of the 6,204,363 tons thus saved in the year 1907 alone, computed at 40 cents per ton, was $2,481,745, while it yielded to the railroads, on the basis of the lowest rate to New York Harbor—$1.10 per ton (Govt. Ex. No. 160, 3 R., 383)—a freight of $6,824,799.

SECOND. In the early nineties began the movement to reclaim from the waste banks the coal which had accumulated there through all the years when buckwheat, rice, and barley, by-products in the manufacture of prepared sizes, were thrown away. (Thompson, 5 R., 975, 976; May, 4 R., 348; Shipments from Washeries, 1890–1907, 2 R., 709.) The process of reclamation is tersely described by Mr. Norris (4 R., 408, 409):

> A special building is erected with screens, rolls, and usually picking devices. The bank is elevated into this building en masse, and the smaller sizes, which are practically all that remain in the bank, are screened out.

The plant is called a washery because—

> in order to clear the previous refuse from the dirt attached, it is necessary to use very large volumes of water in washing the coal. (*Ibid.*, p. 409.)

Shipments from washeries thus include only the small sizes redeemed from the waste banks and not the freshly-mined small sizes.

In 1908 shipments from washeries constituted 15 per cent of the total from the operations on the lands of the Girard Estate (Thompson, 5 R., 976; P. & R. and Erie Exs. Nos. 8–12, 6 R., 380–90.) A table prepared by Mr. Ruley, of the Bureau of Anthracite Coal Statistics, shows the shipments from all washeries since 1890, when they started with 41,600 tons, or 0.11 per cent of the total. (2 R., 709, 710.) From 1890 to 1898 they amounted to 5,165,552 tons; from 1899 to 1907, 25,109,788 tons, being, in 1907 alone, 4,301,082 tons, or 6.41 per cent of the total shipments in that year. (2 R., 709.) Mr. Norris testified that the cost of reclaiming coal from the waste banks is about the same as, or a little more than, the cost of *preparing* (not mining and preparing) freshly mined coal (Norris, 4 R., 409), which, according to the witness May, runs from 15 to 25 cents a ton. (May, 4 R., 263, 265.) The prices actually received by The Philadelphia & Reading Coal & Iron Company at the mines in 1898, 1907, and 1908 for the sizes of which the washery coal principally consists were as follows: buckwheat, $0.70 per ton in 1898, $1.12 per ton in 1907, and $1.26 per ton in 1908; rice, $0.27 per ton in 1898, $0.50 per ton in 1907, and $0.57 per ton in 1908. (Brown, 2 R., 707.)

25,000,000 tons of coal thrown away and lying on the ground as waste redeemed since 1898 at a cost of from 15 to 25 cents a ton and shipped to market and sold, the great bulk of it, for from $0.27 to $1.12 per ton, mine prices, besides yielding to the railroads, on the basis of the lowest rate to New York Harbor—$1.10 a ton (Govt. Ex. No. 160, 3 R., 383)—a freight

of $27,500,000! No wonder defendants' witness, Stevenson, when asked (4 R., 494):

> Q. Has the redemption of the material formerly going to the waste bank and the moneys secured by the sale of that material equaled the advance in the cost of the prepared sizes?

could give no more positive answer in the negative than this (4 R., 494):

> A. I do not think it has. As applied to the entire region, there may be individual operations where it has offset the increased cost of manufacturing and mining.

THIRD. It is not feasible completely to segregate the facts relating to the constantly lessening amount of coal left unmined with the improved methods now employed, because often the witnesses would lump the saving from that source with the saving of the smaller sizes. The Coal Waste Commission of Pennsylvania, reporting in 1893, found that, taking the average for the entire region, only about one-third of the coal in the beds then worked over had been taken out and marketed. (Stevenson, 4 R., 467.) The witness May stated that they now leave behind as a rule only about 10 per cent of a seam, excluding what is called "gob," the refuse that the miner throws back as he mines the coal. (May, 4 R., 274.) Mr. Norris testified that the methods of mining now in use should increase the ultimate production from 15 to 20 per cent (Norris, 4 R., 412), and alluding to the finding of the Coal Waste Commission in 1893 that only about one-third of the beds mined up to that time had gotten to market, he added that it was now hoped "to get very nearly two-thirds of the coal in the ground to market, or better." (Norris, 4 R., 413.) Mr. Stevenson,

referring to the Northern field, testified that in his judgment "from practically one-third of the original thickness of mineable coal now remaining there, as much coal or more will be sent to market in all sizes [as] has been sent from the two-thirds mined out or mined over." (Stevenson, 4 R., 498, 508.) As recently as 1903 the Coal Strike Commission stated that—

> for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent of the contents. (Rep., Strike Com., Bul., Dept. Labor, No. 46, p. 447.)

Yet to-day, only six years later, experts for defendants, count upon a yield of 66⅔ per cent. The Commission found that the estimated coal remaining in the ground in 1901, "upon the basis of 40 per cent recovery would yield 6,450,000,000 long tons." (*Ibid.*, p. 447.) Upon the basis of 66⅔ per cent recovery it will yield 10,750,000,000 long tons.

Not only are the cost-increasing factors thus largely overcome by the cost-reducing ones, but whatever net increase in the cost of production remains the greatly enlarged output goes far to offset. In 1898 the output was 47,145,175 tons; in 1908, 74,592,181 tons—80 per cent greater. (Reps., Pa. Dept. of Mines, 1898, 1908.)

We pass now to the attempt to show, as an important cost-increasing factor, that the mining of thinner and deeper seams involves the production of a larger proportion of the smaller and lower-priced sizes. This was demolished by defendants' own

expert witnesses, who testified that such increases as have been were due to the saving of the smaller sizes which formerly would have been thrown away, to the redemption of additional smaller sizes from the waste banks, and to the demand of the market. (Norris, 4 R., 422–423; Thompson, 5 R., 969–970, 981; May, 4 R., 332–333.)

The testimony of these witnesses is borne out by actual experience. For example, of the total shipments of The Lehigh & Wilkes-Barre Coal Company in 1900, prepared sizes, including lump, constituted 67.4 per cent, and pea and smaller sizes 32.6 per cent, while in 1908 prepared sizes, including lump, constituted 67.71 per cent, and pea and smaller sizes 32.29 per cent. (2 R., 717, 718.) Of the Temple Iron Company's total production in 1899, prepared sizes constituted 67.14 per cent and pea and smaller sizes 32.86 per cent, while in 1908 the proportions were 67.73 and 32.27 per cent, respectively. (Temple Iron Co. Ex. No. 21, 6 R., 129.) In 1900, of the total shipments, excluding coal reclaimed from culm banks, from the operations on the lands of the Girard Estate, in the Schuylkill region (Kirkpatrick, 5 R., 942), where the percentage of smaller sizes is greater than in the Wyoming (Griffith, 2 R., 549, 550), 63.31 per cent consisted of prepared sizes and 36.69 per cent of pea and smaller sizes, while in 1908 the proportions were 63.08 per cent and 36.92 per cent, respectively. (Thompson, 5 R., 973.)

These figures show that in spite of the growing volume of smaller sizes redeemed from waste in the last 8 or 10 years, the proportion of prepared sizes has remained about stationary, which can only mean that so far from a smaller proportion of prepared

sizes being a necessity of the mining of thinner seams, the improved methods now employed win a *larger* percentage of those sizes, as, indeed, was stated in the last annual report (1908) of Lehigh Valley Railroad Company (Baird, 5 R., 775):

> The improvements already made, together with those now in progress, tend not only to offset the increased expense of mining incident to the greater depth of the workings, and the longer underground haul, but also result in a greater percentage of prepared sizes of coal, the same having increased 9.38 per cent in the last five years.

Let us see what increase in the cost of production since 1898 is shown by the books of The Philadelphia & Reading Coal & Iron Company and The Delaware, Lackawanna & Western Railroad Company, the one representative of the Southern field where mining is most expensive, the other of the Northern.

Vice President Richards of the former testified that its average total cost, for all sizes, including labor, supplies, improvements, royalties, and general expenses, was $1.827 per ton in 1898 and $2.146 in 1908, an increase of $0.319. (Richards, 4 R., 696.)

The cost of 5,423,752 tons of coal mined and purchased by the latter in 1898, and of 10,314,359 tons mined and purchased in 1908, was $7,754,833.41 and $17,063,059.23, respectively, or $1.43 per ton in 1898 and $1.65 per ton in 1908, an increase of $0.22 per ton. (Ann. Reps., D., L. & W. R. R., 1898, 1908, 2 R., 726, 736a.) "The cost of everything in connection with its coal operations is included in the charges against coal mined and purchased during the year," including charges for extraordinary repairs, improvements, and

depletion of lands. (Ann. Rep., D., L. & W. R. R., 1899, 2 R., 723, 724; Truesdale, 5 R., 1149.)

Against this increase since 1898 of 22 to 32 cents per ton on all sizes in the cost of production of representative companies, we set increases in the prices actually received at the mines in the same period by The Philadelphia & Reading Coal & Iron Company, the largest producer, of $0.84 per ton on the broken or grate size, $1.04 on egg, $1.01 on stove, $1.25 on chestnut, $0.62 on pea, $0.56 on buckwheat, and $0.30 on rice (Brown, 2 R., 707; Henderson, 4 R., 551; Richards, 4 R., 706, 707); and an increase in the price per ton received at the mines on all sizes taken together of $0.87 by a representative mining company in the Northern field (Temple Iron Co. Ex. No. 21, 6 R., 129), and $0.65 by one in the Southern field, where a larger percentage of small sizes is produced (Brown, 2 R., 707); and increases in the quoted prices at New York Harbor between January, 1898, and January, 1908, by The Philadelphia & Reading Coal & Iron Company, on broken $1.10, on egg $1.10, on stove $0.95, on chestnut $1.20; by The Lehigh & Wilkes-Barre Coal Company, on broken $1.25, on egg $1.35, on stove $1.10, on chestnut $1.35; and between January, 1900, and January, 1908, by The Delaware, Lackawanna & Western Railroad Company, on broken and egg $1.50, on stove and chestnut $1.00; by The Lehigh Valley Coal Company, on broken $1.50, on egg $1.40, on stove $1.00, on chestnut $0.80; and by Hillside Coal & Iron Company and The Pennsylvania Coal Company, on broken $1.45, on egg $1.40, on stove and chestnut $1.00. (Govt. Exs. Nos. 172, 177, 178,

179, 180, 191, 198, 3 R., 428, 433, 434, 435, 436, 479, 488.)

And with this excess of price increase over cost increase per ton between 1898 and 1908, production has increased from 47,145,175 tons in 1898 to 74,592,181 tons in 1908. (Reps., Pa. Dept. of Mines, 1898, 1908.)

Finally, what present net profits from the production and sale of anthracite are disclosed in the annual statements or income accounts of some of the principal companies?

The Philadelphia & Reading Coal & Iron Company.—In the fiscal year 1908, after deducting from income from anthracite coal sales and coal rents (and some small miscellaneous receipts), the cost of mining and repairs, cost of coal purchased, royalties paid on leased collieries, all transportation charges, cost of handling at depots, taxes on coal lands and improvements, improvements and repairs of houses, "all other expenses" of $984,331.46, "improvements at colleries, etc.," of $1,286,010.65, and a charge of $514,349.90 for depletion of coal lands, the net profit of this company was $1,854,899.60 on sales of 10,992,975.16 tons, or 17 cents per ton. (Ann. Rep., Reading Co., 1908, 2 R., 717. Items on either side of account relative to bituminous coal were discarded to get results on anthracite alone.)

The Delaware, Lackawanna & Western Railroad Company.—In the calendar year 1908, after deducting from income from anthracite coal sales (this company is not a dealer in bituminous coal), the cost of coal mined and purchased, including a charge for depreciation of lands (Truesdale, 5 R., 1149), transportation charges, cost of handling, commissions paid, general expenses, taxes, and cost of improvements, the net profit of this company was

$4,166,792.50 on sales of 9,610,127 tons, or 43 cents per ton. (Ann. Rep., D., L. & W. R. R., 1908, 2 R., 736*a*.)

The Lehigh & Wilkes-Barre Coal Company.—In the fiscal year ended June 30, 1908, after deducting from income from anthracite coal sales and coal mined by tenants (and small miscellaneous receipts), the cost of mining and repairs, cost of coal purchased, cost of colliery improvements, royalties paid on leased properties, transportation, yard, and agency expenses, general expenses, insurance, and a charge for depletion of coal lands, the net profit of this company was $3,225,720.06 on sales of 5,271,538.09 tons, or 61 cents a ton. (Ann. Rep., L. & W.-B. Coal Co., 1908, 2 R., 718, 719.)

These net profits are the average on *all* sizes of coal, including those below buckwheat No. 1, which, as seen, were practically all thrown away prior to 1898, but of which in 1907 there were shipped to market and sold by the three companies above named 4,479,910 tons, and by all companies 9,177,541 tons, or 13.6 per cent of the total shipments. (Govt. Ex. No. 14, 3 R., 47, 53.)

These are the only defendant coal companies whose published annual reports show their net profits. As seen, however, the net profit in 1907 of The Philadelphia & Reading Coal & Iron Company, whose mines are in the Schuylkill region—Southern field—was 17 cents a ton by its calculations, and Mr. Baer testified that its cost of production is 40 to 50 cents a ton greater than in the Wyoming region—Northern field—where 60 per cent of the annual supply is produced. (Baer, 5 R., 1175, 1176.) So 60 per cent of the annual output is sold at a net

profit of at least 57 to 67 cents a ton, and this notwithstanding the high freight rates which the producing companies pay their other selves, the carriers.

It remains to touch briefly upon two isolated items that by themselves go far to prove that at present prices the profits earned by defendants are exorbitant. One is the current rate of royalty in coal leases—about 50 cents a ton on prepared sizes, 25 cents on pea, and 12½ cents on rice and barley. (Russell, 5 R., 895, 896; Phillips, 5 R., 924, 925; Thomas, 5 R., 1114, 1115.) These royalties, after deducting a proper depletion of lands charge, say, 5 cents a ton, the amount allowed by The Philadelphia & Reading Coal & Iron Company (2 R., 715, 716) and The Delaware & Hudson Company (Russell, 5 R., 895), must mark the minimum net profit in anthracite mining from lands held in fee, as those of defendants mostly are (Govt. Ex. Nos. 30, 44, 59, 70, 3 R., 103, 119, 136, 151; Thomas, 5 R., 1120); for obviously an owner will not devote his time and capital to getting the coal out himself if he can lease it to another and realize just as much. (Phillips, 5 R., 924.)

The other is this: In April, 1899, The Temple Iron Company, was considering the purchase of Raymond, Seneca, Old Forge, and Mount Pleasant collieries, having a production of about 850,000 tons per annum. (Temple Iron Co. Ex. No. 20, 6 R., 117; May, 4 R., 324, 325.) An examination disclosed that Raymond colliery, after deducting besides all other cost items a royalty of 33 cents per ton, was earning a net profit of 51 cents per ton (*Ibid.*, 6 R., 118, 125); and Seneca, Old Forge, and Mount Pleasant collieries, which were figured together, 40 cents

per ton, after deducting besides all other cost items a royalty of 26 cents per ton (*Ibid.*, 6 R., 123). Since it did not purchase them, although the prices asked were reported to be fair, the presumption is they were not exceptionally profitable.

If a lessee, in 1898, after paying a royalty of 30 cents a ton, was earning from an average group of collieries a net profit of 40 to 51 cents a ton on all sizes, what must be the net profit to-day of *owners* of collieries, without royalties to pay, when the average price of all sizes is 65 to 87 cents a ton higher, with millions of tons going to market that would have been thrown away in the earlier year, while the cost of production is but 22 to 32 cents a ton higher.

Defendants have much to say of the extraordinary expenditures in coal mining proceeding from its hazardous nature. Such expenditures, however, are all charged against the cost of production from year to year. (Richards, 4 R., 698, 699; May, 4 R., 307, 314.) Also, as noted, they include in the cost of production from year to year a reasonable charge for depletion of the coal-bearing lands, and when the mining is from leased lands, a royalty charge. (Truesdale, 5 R., 1149; Russell, 5 R., 895; 2 R., 715, 716; also *supra*, pp. 133–134.)

It is said that the small sizes sell for less than cost of production, entailing a loss which must be recouped in the price of prepared sizes. At the same time it is admitted that these small sizes are but by-products of prepared sizes (e. g., Lathrop, 2 R., 80, 82; Blauvelt, 5 R., 1031), and the only foundation for the statement that they sell for less than cost is in the bookkeeping of some of the defendants, according to which they are charged

with the same cost of production as prepared sizes, the primary product. (Richards, 4 R., 697; Temple Iron Co. Ex. No. 21, 6 R., 129; Erie R. R. Co. Exs. Nos. 5, 6, 6 R., 354, 367.)

THE PROFIT IN TRANSPORTING ANTHRACITE COAL.

The transporting of anthracite naturally divides into several parts: First, the gathering service—distributing empty cars to the various breakers and hauling them when loaded to the concentrating points and there assembling them into trains; secondly, the movement of trains from gathering points to destination; and thirdly, where the carriage is to be continued by water, the discharging of the coal into vessels, including such switching at the terminals as may be needed to keep the sizes separate. (Henderson, 4 R., 567, 572, 607; Dice, 4 R., 628, 642; Ziegler, 4 R., 655, 656; Johns, 4 R., 77.) The cost of gathering varies with the character of the region. From mines on the Philadelphia & Reading Railway, a mountainous locality, the estimate is 30 cents a ton on shipments east and 15 cents on shipments west, the haul to the gathering point in the latter case being shorter and less difficult. (Ziegler, 4 R., 663; Henderson, 4 R., 573.) From collieries in the Wyoming region on the Lehigh Valley Railroad it is 9 cents a ton. (L.V. R. R. Ex. No. 24, 6 R., 223, 224.) The estimated cost of the terminal service, including switching, discharging, etc., is 15 cents a ton at Port Reading, the terminal of the Philadelphia & Reading (Ziegler, 4 R., 656), and between 11 and 12 cents at Perth Amboy, that of the Lehigh Valley. (L. V. R. R. Ex. No. 24, 6 R., 222).

In the fiscal year 1908 anthracite constituted 33 per cent of the total freight tonnage of the Philadelphia & Reading Railway and contributed 41 per cent of its gross receipts from freight (Govt. Ex. No. 21, 3 R., 91) and 34 per cent of its gross receipts from freight and passengers. (2 R., 568.) Its net earnings in that year were $16,268,639.64 (2 R., 568), over 81 per cent on its capital stock (Govt. Ex. No. 18, 3 R., 89), and its surplus on June 30, 1908, was $10,162,066.44. (2 R., 715.) It pays an annual dividend of 30 per cent. (Taylor, 2 R., 189, 190.)

In the same fiscal year anthracite constituted 33 per cent of the total freight tonnage of the Central Railroad of New Jersey and contributed 52 per cent of its gross receipts from freight (deForest, 2 R., 651) and 40 per cent of its gross receipts from freight and passengers. (deForest, 2 R., 651; 2 R., 722.) Its net earnings in that year were $10,120,538.58 (2 R., 722), 37 per cent upon its capital stock. (Govt. Ex. No. 38, 3 R., 116.) It pays an annual dividend of 8 per cent (2 R., 722), and its surplus on June 30, 1908, was $10,583,306.02. (2 R., 720.)

In the calendar year 1908 anthracite constituted 55 per cent of the total freight tonnage of the Delaware, Lackawanna & Western Railroad and contributed 59 per cent of its gross receipts from freight (Hustis, 2 R., 738) and 47 per cent of its gross receipts from freight and passengers. (Hustis, 2 R.,738; 2 R., 734.) Its net earnings in that year from its railroad operations were $14,274,840.57 (2 R., 735), 54 per cent of its capital stock. (Govt. Ex. No. 66, 3 R., 149.) It pays an annual dividend of 20 per cent (Loomis, 2 R., 579), and its surplus on December

31, 1908, was $34,638,995.88, having increased from $15,500,702.71 on December 31, 1899. (2 R., 725, 736.)

In the fiscal year 1908 anthracite constituted 47 per cent of the total freight tonnage of the Lehigh Valley Railroad and contributed 50 per cent of its gross receipts from freight (Wilson, 2 R., 689) and 43 per cent of its gross receipts from freight and passengers. (Wilson, 2 R., 689; 2 R., 573.) Its net earnings in that year were $13,306,449.44 (2 R., 573), 33 per cent on its capital stock. (Govt. Ex. No. 52, 3 R., 130.) It has paid an annual dividend of 6 per cent (Baer, 5 R., 1223), and its surplus on June 30, 1908, was $16,516,904.84. (L. V. R. R. Ex. No. 10, 6 R., 173.) In December, 1910, its dividend was increased to 10 per cent on a doubled capitalization.

The presumption that anthracite, constituting so large a part of their traffic, must yield a most remunerative freight to enable these railroads to make such large net earnings, is rendered conclusive by a closer view of their financial statements.

In the fiscal year 1908 gross earnings of the Philadelphia & Reading Railway from the transportation of 13,537,464 long tons of anthracite were $13,026,030.58; while its total gross earnings were $41,640,939.24, and its total operating and other expenses on all traffic, freight and passenger, $26,395,955.76 (2 R., 568)—63.39 per cent of total gross earnings. It hauled the anthracite an average distance of 98.1 miles and all other freight 96.8 miles. (2 R., 706.) Its gross earnings per net ton per mile on freight other than anthracite were 6.27 mills and on anthracite 6.37 mills (2 R., 706)—1.6 per cent greater.

In the same fiscal year gross earnings of the Central Railroad of New Jersey from the transportation of 8,628,506 long tons of anthracite were $9,983,899.81 (deForest, 2 R., 651); while its total gross earnings were $25,587,176.81, and its total operating expenses on all traffic, freight and passenger, $15,466,638.23 (2 R., 722)—60.40 per cent of total gross earnings. It hauled the anthracite an average distance of 117.80 miles and all other freight 56.12 miles. (deForest, 2 R., 652.) Its gross earnings per net ton per mile on freight other than anthracite were 8.99 mills and on anthracite 7.99 mills (deForest, 2 R., 652)—11.1 per cent less.

In the calendar year 1908 gross earnings of the Delaware, Lackawanna & Western Railroad from the transportation of 8,902,733 long tons of anthracite were $14,588,702.53 (Hustis, 2 R., 738); while its total gross earnings were $32,898,495.36, and its total operating expenses on all traffic, freight and passenger, $18,623,654.79 (2 R., 734)—56.61 per cent of total gross earnings. It hauled the anthracite an average distance of 190 miles and all other freight 169 miles. (Hustis, 2 R., 739.) Its gross earnings per net ton per mile on freight other than anthracite were 7.08 mills and on anthracite 9.64 mills (Hustis, 2 R., 739)—36.1 per cent greater.

In the fiscal year 1908 gross earnings of the Lehigh Valley Railroad from the transportation of 11,206,774 long tons of anthracite were $14,908,923.08 (Wilson, 2 R., 689); while its total gross earnings were $35,510,154.22, and its total operating expenses on all traffic, freight and passenger, $22,203,704.78 (2 R., 573)—62.53 per cent of total gross earnings. It hauled the anthracite an average distance of 161.22

miles and all other freight 198.98 miles. (Wilson, 2 R., 689.) Its gross earnings per net ton per mile on general merchandise freight were 5.51 mills and on anthracite 7.37 mills (Wilson, 2 R., 689)—33.7 per cent greater.

If the ratio of operating expenses to gross earnings were as high on anthracite as on all traffic combined, then on the Philadelphia & Reading Railway operating expenses chargeable against the transportation of 13,537,464 long tons of anthracite in 1908 would be 63.39 per cent of $13,026,030.58, or $8,257,200.79, making net earnings therefrom $4,768,829.79, or 35 cents per ton on all sizes, from grate down to barley, for an average haul of 98.1 miles; on the Central Railroad of New Jersey operating expenses chargeable against the transportation of 8,628,506 long tons of anthracite in 1908 would be 60.40 per cent of $9,983,899.81, or $6,030,275.49, making net earnings therefrom $3,953,624.32, or 46 cents per ton on all sizes for an average haul of 117.80 miles; on the Delaware, Lackawanna & Western operating expenses chargeable against the transportation of 8,902,733 long tons of anthracite in 1908 would be 56.61 per cent of $14,588,702.53, or $8,258,664.50, making net earnings therefrom $6,330,038.03, or 70 cents per ton on all sizes for an average haul of 190 miles; and lastly, on the Lehigh Valley Railroad operating expenses chargeable against the transportation of 11,206,774 long tons of anthracite in 1908 would be 62.53 per cent of $14,908,923.08, or $9,322,549.60, making net earnings therefrom $5,586,373.48, or 50 cents per ton on all sizes for an average haul of 161.22 miles.

But with gross revenue per ton per mile on anthracite greater, except on one road, and its cost of transportation notoriously cheaper as compared with general merchandise freight and passengers, the ratio of operating expenses to gross earnings on anthracite must of necessity be less than the average ratio of operating expenses to gross earnings on all traffic; and therefore the actual rate of net earnings from the transportation of anthracite must be considerably higher than shown above.

The exorbitancy of the tolls for transporting anthracite is brought out by a comparison of the rates on that commodity from the mines to tidewater with the corresponding rates on the article of freight nearest like it in circumstances, bituminous coal. The rate of defendant roads on prepared sizes of anthracite from the mines to the upper ports of New York Harbor, f. o. b. vessel, is $1.60 ($1.58 on the Lackawanna) and to the lower ports $1.55 per gross ton. (Govt. Ex. 160, 3 R., 381.) The length of the haul is 145 miles via the Delaware, Lackawanna & Western, 158 to 215 miles via the Philadelphia & Reading, 159 miles via the Lehigh Valley, 164 miles via the Central of New Jersey, 232 miles via the Erie, and 160 miles via the New York, Susquehanna & Western. (Govt. Ex. 160, 3 R., 382–89.) To Philadelphia, but little over 100 miles from the mines via the Philadelphia & Reading Railway (Dice, 4 R., 650, 651), the rate is $1.70. (Brown, 4 R., 624; Grier, 5 R., 814.) On bituminous coal, from the Beech Creek district to New York Harbor, f. o. b. vessel, via the New York Central, the Philadelphia & Reading, and the Central of New Jersey combined, a distance of 279 miles, the rate is $1.55 per gross ton; from the

Clearfield district, via the Pennsylvania Railroad, a distance of 325 miles, the rate is again $1.55 per gross ton; from the Georges Creek district, via the Georges Creek & Cumberland Railroad and the Pennsylvania Railroad, a distance of 383 miles, the rate is $1.70. (Govt. Ex. 181, 3 R., 438–40.)

Of such comparisons it will be said that by reason of the separation of anthracite into many different sizes the gathering and terminal services there are much more expensive. The Philadelphia & Reading Railway, however, allows as much for the terminal service on bituminous as on anthracite (Ziegler, 4 R., 656), and the superintendent of the Wyoming division of the Lehigh Valley Railroad testified that in gathering "the matter of sizes does not cut much of a figure." (Moon, 5 R., 862.) But let us make a comparison with those two services eliminated. Subtracting the estimated cost of gathering, 30 cents a ton, and the estimated cost of the terminal service at Port Reading, 15 cents a ton, there is left of the Philadelphia & Reading Railway's rate of $1.55 from the anthracite mines to vessel bottoms at Port Reading $1.10, to cover the transportation from the gathering points or scales to the Port Reading yard, a distance of 152 to 160 miles. (Dice, 4 R., 653.) Over this same route, from Reading eastward, the Philadelphia & Reading Railway transports to Port Reading large quantities of bituminous coal received from the Baltimore & Ohio Railroad at Shippensburg (Dice, 4 R., 649; Henderson, 4 R., 602). Subtracting the estimated cost of the terminal service in respect of bituminous coal at Port Reading, 15 cents a ton (Ziegler, 4 R., 656), from the 80 to 90 cents a ton that the Philadelphia & Reading receives for the

complete haul from Shippensburg to vessel bottoms at Port Reading (Henderson, 4 R., 603), there is left 65 to 75 cents a ton for the transportation from Shippensburg to the Port Reading yard, 210 miles (Dice, 4 R., 654), admittedly a profitable rate. (Henderson, 4 R., 603.) Contrast this with the charge of $1.10 for transporting the prepared sizes of anthracite from the gathering points to the Port Reading yard, 152 to 160 miles.

THE ARGUMENT.

An outline of the Argument is set forth in the table of contents (*supra*, pp. I–IV).

I.

THE INTERESTS OF DEFENDANT RAILROADS IN THE SHARES OF COAL OWNING AND PRODUCING COMPANIES AND IN ANTHRACITE COAL LANDS ACQUIRED SINCE JANUARY 1, 1874, ARE HELD IN VIOLATION OF THE CONSTITUTION OF PENNSYLVANIA.

The present Constitution of Pennsylvania, adopted November 3, 1873, effective January 1, 1874, provides, Article XVII, Section 5, that:

> No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length.

We submit that it is clear, from the undisputed facts heretofore stated (The Facts Established, *supra*, pp. 34–44), that Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, *through the coal companies united with them in ownership and management*, are indirectly, if not directly, engaged in mining coal for transportation over their lines.

In the Philadelphia & Reading system, instead of the railroad owning the coal company's shares directly, as the others do, a holding corporation, Reading Company, holds all those of both railroad and coal company. But this device, so far from separating the two, emphasizes the purpose to keep them united in ownership and management. It is impossible to think of Reading Company as separate from Philadelphia & Reading Railway Company. They constitute one and the same association of persons. Both have substantially the same executive officers and directors; the former owns every share of the latter, and also its equipment—locomotives, cars, tugs, barges, etc.; and further, so complete is the fusion, if the railway wishes to raise money, it can not sell its bonds to the public, but must deliver them to the holding company and the latter then issues an equal amount of its own bonds in exchange. (The Facts Established, *supra*, pp. 38–39.)

Mr. Baer, formerly counsel, now president, of the Philadelphia & Reading system, concedes, as we understand him, that a railroad owning substantially the entire capital stock of a coal mining company would be "directly or indirectly" engaged in mining within the meaning of Article XVII, Section 5, of the Constitution of Pennsylvania. For he testified that one reason why, in the reorganization of 1896, the shares of The Philadelphia & Reading Coal & Iron Company, prior thereto held by The Philadelphia & Reading Rail*road* Company, were not vested in its successor, Philadelphia & Reading Rail*way* Company, but in a holding company, was that under the Constitution the railway was prohibited from holding such shares. (Baer, 5 R., 1203, 1204.)

It has also been judicially recognized that these coal companies are but arms of the railroads.

In the instant case Judge Buffington declared (1 R., 426, 427):

> The substantial identity of the several defendant railroads and their respective subsidiary coal companies is shown in the proofs.

The Interstate Commerce Commission, in *Meeker & Co.* v. *Lehigh Valley R. Co.*, decided June 8th, 1911, stated:

> It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations, usually known as "coal companies," but which through stock ownership were owned, officered, and controlled by the railroads which brought them into existence.

In *Interstate Commerce Commission* v. *Philadelphia & Reading Ry. Co., et al.* (123 Fed., 969), referring to the ownership of the stock of The Lehigh Valley Coal Company by the Lehigh Valley Railroad, a representative example, Judge Lacombe said (p. 971):

> It appears by the record that the capital stock of the Lehigh Valley Coal Company is all owned by the Lehigh Valley Railroad Company, and it may fairly be contended that its transactions, if not those of an agent of the railroad company, were conducted solely in its interests.

Of the relation between the same companies the Court below, in another case, said (*Lehigh Valley R. Co.* v. *Rainey*, 112 Fed., 487, 488):

> The identity of interest between the two corporations was so plain that it seemed idle to question it, * * *.

In *Stockton, Attorney General* v. *Central R. R. of N. J., et al.* (50 N. J. Eq., 52), referring to the ownership of the stock of The Philadelphia & Reading Coal & Iron Company and The Lehigh & Wilkes--Barre Coal Company by the Philadelphia & Reading Railroad and the Central Railroad of New Jersey, respectively, the Court said (p. 82):

> Whatever may be the nominal ownership or the legal title, for the substantial purposes of the injury apprehended and the Attorney General's complaint, the railroad companies stand as the owners of the coal lands in this Court.

In *Farmers Loan & Trust Co.* v. *The New York, &c., R. Co.* (150 N. Y., 410), the Court of Appeals of New York held that (p. 430):

> Where, as in this case, a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of the stock.

In *York, &c., R. Co.* v. *Winans* (17 How., 31), this Court said (p. 40):

> It is certainly true that the law will strip a corporation or individual of every disguise, and enforce a responsibility according to the very right, in despite of their artifices.

The reasoning of the *Commodities Clause case* (213 U. S., 366) is not in conflict with the view that a railroad owning substantially the entire capital stock of a coal mining company is "directly or indirectly" engaged in mining within the meaning of the Pennsylvania Constitution. In that case the question was

whether within an entirely different enactment—an Act of Congress—ownership of *any* or all of the stock of a coal company by a railroad gave the latter an "interest, direct or indirect," in the coal mined by the former; and the conclusion was that of itself it did not, because circumstances connected with the passage of the Act showed that such was not the purpose of Congress (p. 414), and because further, since the alternative construction would raise grave and doubtful constitutional questions, the Court should not adopt it (pp. 407, 414). But these reasons, being peculiar to that Act, are only applicable in similar situations. The situation of this provision of the Pennsylvania Constitution is not similar; it is just the reverse. For the obvious purpose was to go as far as possible in divorcing carrier and producer in Pennsylvania and no constitutional question stands in the way of giving the words used to effect that purpose their unrestricted meaning.

Furthermore, where, as here (The Facts Established, *supra*, pp. 34–44), the coal company is run as a department of the railroad, this Court has held that the latter has an "interest, direct or indirect," in the mining, even within the restricted sense of those words in the Commodities Clause. (*United States* v. *Lehigh Valley R. Co.*, 220 U. S., 257.)

Assuming it established that a railroad owning substantially all the stock of and controlling a coal mining company shipping over its line is "directly or indirectly" engaged in mining articles for transportation over its line within the meaning of Article XVII, Section 5, of the Constitution of Pennsylvania, effective January 1, 1874, it must follow that—

Where a railroad, since that date, has become so engaged directly or indirectly in mining coal for transportation over its line by acquiring the stock of and controlling a coal mining company, it holds such stock in violation of the Pennsylvania Constitution.

Therefore, defendant Reading Company (alter ego of Philadelphia & Reading Railway Company) holds the entire capital stock of The Philadelphia & Reading Coal & Iron Company, defendant Lehigh Valley Railroad Company that of The Lehigh Valley Coal Company and of Coxe Brothers & Company, defendant Erie Railroad Company that of Hillside Coal & Iron Company and of The Pennsylvania Coal Company, defendant The Central Railroad Company of New Jersey a majority of that of The Lehigh & Wilkes-Barre Coal Company, and defendant The New York, Susquehanna & Western Railroad Company a majority of that of The New York, Susquehanna & Western Coal Company, in violation of the Pennsylvania Constitution, having acquired their holdings subsequent to January 1, 1874. (The Facts Established, *supra*, pp. 37, 40, 41, 42, 43, 44.)

But it is said that before this constitutional prohibition was adopted defendant railroads, excepting Philadelphia & Reading Railway, had been authorized by an Act of Pennsylvania, passed July 15, 1869 (Pa. L. 1869, p. 31) to acquire and hold, as they have done, the capital stocks of coal owning and producing companies. (Opinions of Gray and Lanning, JJ., 1 R., 397, 457.) That Act provides—

> that it shall * * * be lawful for railroad * * * companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this

commonwealth, by the purchase of their capital stock and bonds.

Philadelphia & Reading Railway Company, having been organized after and expressly subject to the Constitution of 1874, does not claim authority under the Act of 1869 to acquire shares of coal mining companies. (Baer, 5 R., 1203–4.) But Reading Company does claim such authority under its own charter of May 24, 1871. (2 R., 610, 620, 622.)

Conceding that prior to January 1, 1874, the Legislature of Pennsylvania had authorized railroads, either in their own names or indirectly through holding the stock of and controlling coal-mining companies, to engage in mining coal for transportation over their own lines, it was yet within the power of the people of that State, believing the privilege improvidently granted and its continued exercise a menace, to provide in their new Constitution, all existing laws and charters to the contrary notwithstanding, that no railroad *not then so engaged in mining coal* should thereafter be permitted to do so; that the authority once granted, whether by general or special law, *in so far as it remained unexecuted*, was then and there repealed. (*Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 646; *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S., 677.)

The State would have this power, moreover, irrespective of any reserved right to revoke the privilege of acquiring the shares of coal companies given to railroads by the Act of 1869, and to Reading Company by its charter of May 24, 1871. (*Louisville & Nashville R. Co.* v. *Kentucky, supra*, p. 695.) However, all rights and privileges granted to corporations in Pennsylvania since 1857 were taken expressly sub-

ject to revocation, excepting in so far as they might become executed; the Pennsylvania Constitution of 1790, as amended in 1857, providing that (Art. I, Sec. 26; I Brightly's Purdon's Dig. Pa. L., 10 ed., p. 24):

> The legislature shall have the power to alter, revoke or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the commonwealth; in such manner, however, that no injustice shall be done to the corporators.

Of the effect of this reservation as regards the operation of the Constitution of 1874 upon existing charters, the Supreme Court of Pennsylvania said in *Pennsylvania Railroad* v. *Duncan* (111 Pa., 352, 361):

> Therefore, all corporations falling within the terms of the Act of 1855, or the amendment of 1857, are, so far as the provisions of that statute, or that amendment extend, concluded by the action of the Convention of 1873. Beyond this, however, its prohibitions neither did, nor were intended to go, and so we have held in *Hays* v. *Commonwealth* (82 Pa., 518), and subsequent, cognate cases.

The limitation upon the right to alter or revoke expressed in the clause, "in such manner, however, that no injustice shall be done to the corporators," is found in several Constitutions, and its meaning was considered by this Court in *Bienville Water Co.* v. *Mobile* (186 U. S., 212), where it was said (p. 222):

> We do not think it necessary to determine absolutely the precise meaning of this section or the limits of judicial inquiry under it. It may be simply declaratory, for courts have often held that it was beyond the power of the

> legislature, under the guise of an act amending or repealing a charter, to take away the property of the corporation. Clearly, the question is, in the first instance, presented for the consideration of the legislature, and a presumption of validity attends its action.

It is next suggested that Reading Company bought the shares of The Philadelphia & Reading Coal & Iron Company from the purchasers at a judicial sale of the property of the Philadelphia & Reading Railroad, which acquired them *prior to January 1, 1874;* and that the Erie Railroad bought the shares of Hillside Coal & Iron Company from the purchasers at a like sale of the property of the New York, Lake Erie & Western Railroad, which likewise acquired them *prior to January 1, 1874.* This, however, can make no difference. If Reading Company and the Erie Railroad were prohibited by the Pennsylvania Constitution from acquiring and holding the shares in question, the disability was not removed by acquiring them at a judicial rather than a private sale, since the Constitution makes no distinction between the two modes.

Precisely this question arose in *Louisville & Nashville R. Co.* v. *Kentucky* (161 U. S., 677), and this Court thus disposed of it (pp. 692, 693):

> *We do not understand, however, that the fact that a purchase is made at judicial sale confers upon the purchaser any right he is forbidden to acquire if the purchase had been made at private sale.* If, from reasons of public policy, the legislature declares that a railway shall not become the purchaser of a parallel or competing line, the purchase is not the less unlawful because the parties choose to let it take the form of a judicial sale. [Italics ours.]

If, as to the Erie, it be further said that it acquired the right to hold the shares of coal mining companies by transfer from its predecessor in title, New York, Lake Erie & Western Railroad Company, the answer is that the former, as the successor of the latter in reorganization proceedings, is a new corporation, and as such subject to all statutory restrictions in force when it came into being in 1895, just as if it had no relation to the old corporation. It could not, therefore, obtain by transfer from its predecessor the latter's right (if any it had) to hold the stock of coal mining companies in Pennsylvania if the Constitution or laws of Pennsylvania then prohibited such stockholding by a railroad. (*Atlantic & G. Ry. Co.* v. *Georgia*, 98 U. S., 359; *St. Louis & I. M. & S. R. Co.* v. *Berry*, 113 U. S., 465; *Keokuk, &c., R. Co.* v. *Missouri*, 152 U. S., 301, 308–10; *Mercantile Bank* v *Tennessee*, 161 U. S., 161, 171; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S., 1, 18–21; *Yazoo & M. V. R. Co.* v. *Vicksburg*, 209 U. S., 358, 362.)

Nor is the Central of New Jersey's ownership of the shares of The Lehigh & Wilkes-Barre Coal Company, formed in 1874 by consolidating Wilkes-Barre Coal & Iron Company and Honeybrook Coal Company, in any better position to face this constitutional prohibition because obtained in exchange for shares of the constituent companies acquired by the Central *prior to January 1, 1874*.

It is enough that the Central acquired the shares of *The Lehigh & Wilkes-Barre company after January 1, 1874*. For the latter was an entirely new corporation—not less so because formed by a consolidation of preexisting corporations. (See cases last cited.)

The Central's acquisition after January 1, 1874, of the shares of The Lehigh & Wilkes-Barre company was therefore not a continuation of its ownership of the shares of the constituent corporations but a new and independent acquisition, and as such controlled by the laws then in force. Obviously it cannot follow, merely because a railroad once had authority to acquire shares of coal companies A and B, that it has authority at another time to acquire those of coal company C.

Again, if it be admitted that the Act of 1869 wrote into the charters of Wilkes-Barre Coal & Iron Company and Honeybrook Coal Company the right to have railroads purchase their shares, they could not transfer such right to their successor corporation, The Lehigh & Wilkes-Barre company, since in the meantime the prohibition in the Pennsylvania Constitution of 1874 had gone into effect.

> The authorities are numerous and conclusive that no corporation can receive, by transfer from another, an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the Constitution or laws of the State then applicable; and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. (*Rochester R. Co.* v. *Rochester*, 205 U. S., 236, 254, and cases there cited.)

To the same effect are the later cases of *Yazoo & M. V. R. Co.* v. *Vicksburg* (209 U. S., 358) and *Great Northern Ry. Co.* v. *Minnesota* (216 U. S., 206).

It has been erroneously said that in *Commonwealth* v. *New York, L. E. & W. R. Co.* (132 Pa., 591) the Supreme Court of Pennsylvania decided that a rail-

road, consistently with Article XVII, Section 5, of the Pennsylvania Constitution, may acquire and hold shares of a coal mining company shipping over its line. That was an action for the escheat of lands under an Act of Pennsylvania of 1855 prohibiting a corporation from holding real estate unless authorized by the law of that State and had nothing to do with the constitutional provision. The Court, declaring that—

> the act strikes only at the holding of the title; and, as it is a highly penal statute—penal to the extent of practically confiscating all real estate held in violation thereof—we are not at liberty to extend it beyond its terms (p. 609),

decided that lands held by a Pennsylvania corporation whose entire stock was owned by a foreign corporation itself not authorized to hold them, were not liable to escheat under the Act. So far from this constitutional provision being involved, the Court expressly stated that it was not (p. 605):

> For present purposes, we must regard this constitutional provision as out of the case. The question here is whether the real estate in controversy is liable to escheat.

And counsel for the defendant railroad company themselves contended that (p. 604):

> The operation of Section 5, Article XVII of the Constitution, upon the rights of the railroad company in the lands in question, is not raised upon the present record, * * *.

The Court did state that the Act of 1869 authorized the New York, Lake Erie & Western Railroad to own the stock of the coal company which held title to the lands, but in so stating it was admittedly interpreting

the Act as written, without considering the effect of Article XVII, Section 5, of the Constitution of 1874 (pp. 605, 611). Indeed, in no view was it necessary to consider that question, as the railroad acquired the stock in November, 1873, when the Act of 1869 was unquestionably in full force (p. 595).

Thus far Article XVII, Section 5, of the Pennsylvania Constitution of 1874 has been considered only with reference to railroads which became engaged in mining *after* its adoption. But it does not stop there.

It is clear from the text of the provision and the history of the times that the purpose was to assert all power remaining in the people to divorce the functions of carrier and producer, and therefore, unless their power did not go that far, the provision must be construed not only to prohibit any carrier in the future from becoming a producer of coal for transportation over its line, but to prohibit any carrier then exercising the power, not from continuing so to do in respect of property or other rights already become vested under it, but from becoming *further* engaged in mining coal for transportation over its line by acquiring and mining additional coal-bearing lands or the stocks of additional coal-mining companies.

Was it beyond the power of the people of Pennsylvania to go that far? Because the legislature once authorized railroads to hold coal lands and mine therefrom coal for transportation over their lines, does it follow that neither the legislature, nor the people in their fundamental law, while leaving unimpaired the right to hold the lands already acquired and to mine coal therefrom for transportation over their lines, may yet not enact that such railroads

shall not acquire and mine *further* coal lands *in the future* and so become *further* engaged in mining coal for transportation over their lines? If a grant to corporations, either by general or special law, shall in the course of time become inimical to the public interests, is it not within the power of the people, while respecting rights already secured thereunder, to rescind the grant so far as it remains unexecuted?

These questions were answered in *Pearsall* v. *Great Northern R. Co.* (161 U. S., 646) and *Louisville & Nashville R. Co.* v. *Kentucky* (161 U. S., 677). The issue in each of those notable cases was whether a grant to a railroad to consolidate with or purchase the shares of other roads could be taken away in respect of competitive lines, in so far as it remained unexecuted, the right to amend being reserved in the charter in one case, but not in the other. (161 U. S., 694, 695.) This Court held that it could in either case, saying in *Louisville & Nashville R. Co.* v. *Kentucky* (p. 685):

> We regard the issue presented in this case as involving practically the same question. While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the Pearsall case, that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired.

The principle deducible from these two cases is that where a privilege granted to a corporation has in the progress of events become inimical to the public welfare, the State, exercising its police power, may rescind it so far as unexecuted, whether or not the right to amend is reserved in the charter. From which it follows that—

Where a railroad lawfully engaged prior to January 1, 1874, in mining coal, either in its own name or through a subsidiary company, has since that date, in its own name or through a subsidiary company, acquired and mined additional coal lands and so become *further* engaged in mining, such lands are held in violation of the Pennsylvania Constitution.

Therefore, although the defendant The Delaware, Lackawanna & Western Railroad Company was invested with and exercising the power to own and mine coal lands on January 1, 1874, when the constitutional prohibition took effect, yet the 7,786 acres acquired by it since then (The Facts Established, *supra*, p. 26) are held in violation thereof.

It is thus seen that the entire holdings of Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, in the shares of coal owning and producing companies, and 7,786 of the 15,203 acres of coal lands of The Delaware, Lackawanna & Western Railroad Company, are held in violation of the Pennsylvania Constitution.

II.

RAILROADS ENGAGED AS DEFENDANTS ARE IN TRANSPORTING COALS OF THE SAME KIND FROM A SOLE AND RESTRICTED AREA OF PRODUCTION TO THE PRINCIPAL MARKET ARE COMPETITIVE, ALTHOUGH THEIR TRACKS MAY NOT REACH THE SAME MINES.

Whether railroads are competitive is a question of mixed law and fact. (*State* v. *Vanderbilt*, 37 Ohio St., 590; *United States* v. *Union Pacific R. Co.*, 188 Fed., 102, 113.)

There is perhaps no better general statement of the test to determine if they are such than that it depends on whether the relation between them "is liable to have an appreciable effect on rates." (Thayer, J., in *Kimball* v. *Atchison, &c., R. R.*, 46 Fed., 888, 890.)

A list of cases in which the question has been considered will be found in Appendix B (*infra*, p. 402).

It is not necessary that railroads be parallel—that they connect the same two points—in order to be competitive. It was so held by this Court in *Louisville & Nashville R. Co.* v. *Behlmer* (175 U. S., 648) as to lines from Memphis, Tenn., to Charleston, S. C., and from northern and northwestern points to the latter city; and the same principle is recognized in the numerous statutes prohibiting the consolidation of roads parallel *or* competitive—not parallel *and* competitive, cited in Appendix C (*infra*, p. 404).

The opinion in the Behlmer case distinctly negatives the theory "that the competition of one transportation line can not be said to meet that of another for the carriage of traffic from any particular locality unless one line could perform the service if the other did not"—that two railroads are competitive only when parallel and when both are in position to pick up the same carload of freight at the point where this

originates. The conclusion of the Interstate Commerce Commission, that within the fourth section of the Act to Regulate Commerce dissimilar circumstances and conditions are not produced by any "competition however substantial not originating at the initial point of the traffic," was emphatically overruled, and, reaffirming the doctrine declared in former cases, this Court, by Mr. Justice White, said (175 U. S., 670–671):

> What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected transportation and rates might, under the statute, be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. Not only this, but if the distinction be applicable, only that competition which might deflect at the point of origin the traffic from one carrier to another would be within the purview of that portion of the fourth section now under consideration, and competition which was so great as to

> absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation. This would lead to the construction that the statute, in empowering a carrier, under certain competitive conditions, of his own volition to exact a lesser rate for the longer haul, contemplated only the interest of some particular carrier and not at all the public interest.

See also *Texas & P. R. Co.* v. *Interst. Com. Com.* (162 U. S., 211); *Interst. Com. Com.* v. *Ala. Mid. R. Co.* (168 U. S., 173).

Two or more railroads reaching the same narrow field of production—mines or factories—with power to build branches to all parts thereof, and connecting the same with a common market, must seek to transport to the latter like goods, and certainly are in position vitally to affect each other's traffic and rates, whether they reach the same individual units of production or not, and therefore are competitive.

This is admittedly the situation of defendants Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company.

Each operates a line from the anthracite fields of Pennsylvania, virtually the sole source of supply, to New York Harbor, the principal market and distributing point and destination of approximately 33 per cent of the entire shipments outside Pennsylvania. (The Facts Established, *supra*, pp. 23, 24.)

Each, moreover, is authorized to build branches into any part of those fields, the Lehigh Valley and the

Delaware, Lackawanna & Western under their special charters (Pa. L., 1855, p. 110; Pa. L., 1856, p. 107; 2 R., 633), the Philadelphia & Reading as a corporation organized under the General Railroad Act of April 4, 1868 (2 R., 608), and the Central of New Jersey, the Erie, and the New York, Susquehanna & Western through controlled companies organized under said Act of April 4, 1868 (2 R., 628, 635, 636). The Act of April 4, 1868, provides (2 Pepper & Lewis's Dig. Pa. Laws, 3926):

> Any company incorporated under this Act shall have authority to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public.

How the power to build branch lines intensifies the competition naturally existing among these railroads is well illustrated in the construction some years ago by the Philadelphia & Reading Railroad of a branch line to the mines of Coxe Brothers & Company for the express purpose of contesting with the Lehigh Valley Railroad for the large tonnage of that producer (2 R., 565; Baird, 5 R., 780).

Again, under the Constitution of Pennsylvania, Article XVII, Section 1:

> Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad; and shall receive and transport each the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination. (See *Pa. R. R.* v. *Com.*, 7 Atl., 368, 372.)

That defendant railroads are competitive is, indeed, unqualifiedly admitted by their own officers.

Mr. Baer, president of Philadelphia & Reading Railway Company and The Central Railroad Company of New Jersey (5 R., 1207):

> Q. Those roads [he had named them] are all carrying anthracite coal to the New York Harbor?—A. Yes, sir.
>
> Q. And you regard them as competitors who must be considered in fixing rates?—A. Yes, sir; unquestionably.

Mr. Harris, predecessor of Mr. Baer as president of the Philadelphia & Reading (2 R., 17, 18):

> Q. During the time that you were president of The Philadelphia & Reading Railroad Company, from 1893 to 1901, what were the competitive roads in the coal trade with which you came in competition?—A. We came in competition with all the roads that were carrying coal from Pennsylvania.

Mr. Thomas, president of Lehigh Valley Railroad Company (5 R., 1082, 1083, 1120):

> Q. You said the competition between these roads has at some times been very severe in reference to coal lands, as I understood you?—A. Yes, sir.
>
> Q. Between what roads has that competition been particularly severe?—A. I think all of them, in times past.
>
> Q. What was the occasion of that competition? What was the underlying motive for it?—A. To secure absolutely to their own roads the tonnage for the future.

Mr. Baird, secretary of Lehigh Valley Railroad Company (5 R., 783, 784):

> Q. * * * Are there other railroads which compete with the Lehigh Valley for the coal tonnage?—A. Yes, sir.

Q. What are those roads?—A. Philadelphia and Reading Railroad Company, the Central Railroad Company of New Jersey, the Delaware, Lackawanna and Western Railroad Company, the Delaware and Hudson Company, the Pennsylvania Railroad Company.

Q. How about the Erie?—A. That is also a competing line.

Q. All those roads now are competing for the hard coal traffic?—A. I believe so.

* * * * *

Q. They are all active competitors?—A. They are all active competitors.

Again, in paragraphs 5 and 8 of the answer of Erie Railroad Company and paragraphs 5 and 8 of the answer of The New York, Susquehanna & Western Railroad Company, in a proceeding instituted in 1902 before the Interstate Commerce Commission by W. R. Hearst against the anthracite railroads, it is admitted that such railroads are competitive (3 R., 344, 346). The answer of The Central Railroad Company of New Jersey in the same proceeding "admits that some of the defendants, of which it is one, are competitors in the business of transporting anthracite coal from the anthracite coal fields in Pennsylvania to tidewater at New York Harbor" (3 R., 342). The fact that The Delaware & Hudson Company, which does not reach tidewater, and Baltimore & Ohio Railroad Company, which does not reach the anthracite mines, were among the defendants in that proceeding (3 R., 332), would explain why the admission was limited to *some* of the defendants.

In the same proceeding the Commission ordered witnesses to answer questions framed to bring out whether the prices of anthracite at tidewater were

fixed by agreement among such roads or their coal companies, it having appeared that at times the freight rates were a percentage of the tidewater prices and hence bound up in them. The ground for allowing these questions was that upon the issue whether the tidewater rates were unreasonable it was to be considered whether they were fixed under the check of competition or with competition silenced (see Record, *Interstate Commerce Commission* v. *Baird*, No. 409, October Term, U. S. Supreme Court, pp. 364, 365, 391)—a ruling obviously based upon the assumption that these railroads are competitive. The witnesses having refused to answer such questions, whether they were bound to do so or not reached this Court, which, reversing the Circuit Court, sustained the Commission's ruling. (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25.)

In *Stockton* v. *Central Railroad Co.* (50 N. J. Eq., 52) it was held that Philadelphia & Reading Railroad and Central Railroad of New Jersey, which are typical of the situation of all the defendant railroads, are competitive (p. 56); and the Court enjoined them from acting under any arrangements or combinations having for their object the prevention of *competition* between them in the *transportation* of anthracite. (50 N. J. Eq., 491.)

In its answer in that case the Central again admits that the anthracite roads are competitive. (3 R., 474.)

The Interstate Commerce Commission has also held—or rather, assumed as a matter undisputed—that other railroads in the same physical position with respect to each other as the anthracite carriers—in a position, indeed, less impelling to rivalry—are com-

petitive. The question before it (Rep., Jan. 25, 1907, under Pub. Res. No. 8, app. Mar. 7, 1906), was whether the railroads transporting bituminous coal from mines in Pennsylvania, Maryland, West Virginia, and Virginia to tidewater outlets on the North Atlantic and Chesapeake Bay had monopolized that traffic. These roads were the New York Central & Hudson River, Beach Creek Division, with a line from mines in Western Pennsylvania to New York Harbor; the Pennsylvania, with a line from mines in Western Pennsylvania to the harbors of Baltimore, Philadelphia, and New York; the Baltimore & Ohio, with a line from mines in Western Pennsylvania, Maryland, and West Virginia to the harbors of Baltimore, Philadelphia, and New York; the Norfolk & Western, with a line from mines in Virginia to Norfolk; and the Chesapeake & Ohio, with a line from mines in West Virginia to Newport News. It was so plain that those lines were competitive that, while proceeding upon that theory, the Commission did not discuss the point but took it for granted. (*Ibid.*, pp. 46, 47.)

In *Interstate Commerce Commission* v. *Chesapeake & Ohio Railway Company* (200 U. S., 361) this Court declared (p. 397):

> And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and *competing roads* to make a similar reduction on the published rates, and

> thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. [Italics ours.]

The "competing roads" of the Chesapeake & Ohio must certainly have been the Norfolk & Western, the Baltimore & Ohio, the Pennsylvania, and the New York Central & Hudson River, or one or more of them, because, excepting the Western Maryland, there are no other carriers of bituminous coal from the mines to the North and Middle Atlantic seaboard. (See also *Wight* v. *United States*, 167 U. S., 517.)

If these bituminous carriers, one reaching mines in Virginia, another mines in West Virginia, and still others mines in Maryland and Pennsylvania, with their respective tidewater terminals as far apart as Norfolk and New York, are competitive lines, with how much greater force can it be said that the anthracite carriers are likewise competitive lines?

Finally, it was found in the Court below that defendant railroads are competitive.

By Judge Buffington (1 R., 426):

> These six defendant railroads are not only competitors with each other by virtue of the natural conditions incident to all common carriers, but being themselves, through their several subsidiary coal companies, hereinafter called defendant coal companies, buyers of coal from operators, producers of coal themselves, and likewise sellers of such bought and produced coal, they are in keen competition with each other not only in transporting, but in buying coal to originate freights and in selling it to realize profits.

And Judge Lanning, referring to the Philadelphia & Reading and the Central of New Jersey, which are typical of the situation of all, found (1 R., 456, 457):

> * * * The argument that the Philadelphia & Reading and the Central were not competing but were connecting roads is not sound. To a certain extent they did supplement each other, but as the Port Reading road gave to the Philadelphia & Reading an outlet to New York Harbor for its coal-carrying business, without the use of the Central's road, the Philadelphia & Reading and the Central were, previous to the combination, in the position of competitive carriers of coal, even though they did not reach the same mines or the same parts of the Wyoming region. Mr. Baer himself said: [Quoting from his testimony, 5 R., 1207.]

It is thus seen that in economic theory, in practice, in the opinion of their own highest officers, and by judicial determination the railroads transporting anthracite coal from the single area of production to tidewater are competitive.

And since the destruction of competition between them is one of the grounds of complaint in this case, it is not amiss to recall the following statement by a great judge and publicist and some time chairman of the Interstate Commerce Commission, of the importance of preserving such competition.

> * * * all combinations in a business which so intimately concerns the public look like attempts to establish a monopoly, and may sometimes result in establishing one. To monopoly the public is instinctively hostile, because it takes from them the power of dealing on equal terms with those who control it. * * * it is not to be wondered at therefore that the question should be made whether it

> is competent to erect barriers to free competition in a business so important to the public as that which is carried on by the railroads. (Judge Cooley, in *Railway Review*, April 26, 1884.)

The Interstate Commerce Commission lately said (*In Re Consolidations, etc.*, 12 I. C. Rep., 277, 305):

> It is contrary to public policy, as well as unlawful, for railways to acquire control of parallel and competing lines. This policy is expressed in the Federal laws and in the constitutions and laws of nearly every State in the Union. We have examined the constitutions and laws of all the States, and find in about forty of them prohibitions against consolidations of capital stock or franchises of competing railways, or the purchase and acquisition by a railway of competing lines. Competition between railways as well as between other industries is the established policy of the Nation.

There is no conflict between the Act of July 2, 1890, and the Act to Regulate Commerce, in that one commands competition amongst railroads, whilst the other, by requiring rates to be equal and public, renders it impossible.

Requiring rates to be equal does not prevent competition; it prevents discrimination which kills competition. Nor does publicity prevent competition. There is no secrecy as to prices of staples in the world's markets. Competition, rightly understood, does not mean warfare. Two railroads, like two dealers, may be competitive, though their rates at a given time are the same. They are competitive in that should one through good management or economy lower its rate the other must; in that

if one attempts a higher rate it may be checked by the other. Moreover, rivalry in rates is but one form of competition. Rivalry in facilities and service is not less important.

III.

ALL THE DEFENDANTS ARE ENGAGED IN A COMBINATION OF GENERAL SCOPE (REFERRED TO IN THE RECORD AS THE GENERAL COMBINATION) BY WHICH DEFENDANT READING COMPANY AND DEFENDANT RAILROADS AND THEIR AFFILIATED COAL COMPANIES CONTROL, RESTRAIN, AND MONOPOLIZE THE PRODUCTION, TRANSPORTATION, AND SALE OF ANTHRACITE COAL AMONG THE STATES, AND DOMINATE THE INDUSTRY, IN VIOLATION OF THE ACT OF JULY 2, 1890.

The petition (paragraph VII) alleges that in violation of Sections 1 and 2 of the Act of July 2, 1890, defendant Reading Company and defendant railroads and their affiliated coal companies, owning or controlling 90 per cent, more or less, of the entire anthracite deposits, and producing 75 per cent, more or less, of the annual supply, and controlling all the means of transportation between the anthracite mines and tidewater save the Pennsylvania Railroad and the New York, Ontario & Western Railway—

> entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other States and its price and sale throughout the several States, with the result that competition in the transportation and sale of anthracite coal has been wholly suppressed and the price thereof to consumers greatly enhanced. (1 R., 17.)

The remaining defendants, independent operators, are alleged to have made certain contracts with the above-mentioned defendants in furtherance of such combination and thus to have become parties to it. (1 R., 17, 38.)

The prayer is that the combination be enjoined, etc. (1 R., 25, 40.)

The answers deny this charge. (1 R., 44, 59, 69, 75, 80, 88, 96, 107, 110, 112, 118, 121, 130, 153, 162, 175, 183, 191, 199, 207, 217, 223, 225, 231, 234, 241, 249, 251, 254, 261, 263, 272, 280, 282, 291, 305, 307, 309, 311, 320.) The denial of Reading Company is representative. (1 R., 44.)

The decree (paragraph fourth) adjudged this charge not sustained and as to it dismissed the petition. (1 R., 468.)

This was assigned as error by the Government. (Assignment of Errors, II, III, XI, 1 R., 470, 472.)

To sustain this charge the proof need not disclose that the combination here assailed possesses a complete monopoly of the anthracite trade. (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, 16.) It is enough if it embraces a sufficient volume to be "unreasonably restrictive of competitive conditions," or that its purpose was to control the trade. (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 58.) Therefore, more than this need not be proved, though a complete monopoly were alleged, since "it is sufficient to prove so much of the charge as constitutes an offense punishable by law." (Shaw, C. J., in *Com.* v. *Griffin*, 21 Pick., 523, 525; *Com.* v. *O'Brien*, 107 Mass., 208; *Rex* v. *Hunt*, 2 Campb., 585; *Hall* v. *United States*, 168 U. S., 632, 639.)

Nor is it necessary to prove that defendants formally met and in terms, written or verbal, agreed to do the things denounced by the statute, and with equal formality continued their agreement. (Noyes, Intercorp. Rel., 2d ed., sec. 375; *Kelly et al.* v. *People*, 55 N. Y., 565, 576; *Reg.* v. *Murphy*, 8 C. & P., 297, 310.)

Nor can defendants now be heard to object that this charge is too indefinite, after accepting and going to trial on the issue as tendered.

Leaving these preliminary matters, the Government maintains that the alleged General Combination is established by considering:

1. The purpose to combine long entertained by defendant railroads and their affiliated coal companies, as gathered from previous recurring attempts.

2. The association since 1899 of defendant railroads and their affiliated coal companies in The Temple Iron Company.

3. The association of defendant railroads, their affiliated coal companies and the other defendants, in the system of identical contracts known in the record as 65 per cent contracts.

4. The use by defendant railroads and their affiliated coal companies of the Bureau of Anthracite Coal Statistics as an instrument to suppress competition.

5. The increase of prices in 1902 and the maintenance thereof at the higher level by the affiliated coal companies of defendant railroads acting in concert.

6. An increase in the price of anthracite since 1898 out of all proportion to the increase in the cost of production.

7. The acquisition in 1901 by several of defendant railroads in unison of shares of one of their own number and a competitor, Lehigh Valley Railroad Company, and their continued association as shareholders thereof until after the petition was filed.

Before stating this evidence, it seems not inappropriate again to call attention to the theory of the case, viz: That there is a General Combination to control the industry; several contributory combinations among varying groups of the defendants in themselves unlawful; and that all the latter might be properly attacked in one proceeding without allegation or proof of the former (*supra*, p. 4).

The present proposition especially concerns the General Combination as heretofore defined. As evidencing that two of the separate acts and combinations—The Temple Iron Company and the 65 per cent contracts—are of controlling importance. These must be considered here, therefore, in that aspect, along with other evidence of like effect, and again later in their character as combinations of narrower scope in themselves unlawful.

(1) THE PURPOSE TO COMBINE LONG ENTERTAINED BY DEFENDANT RAILROADS AND THEIR AFFILIATED COAL COMPANIES AS GATHERED FROM PREVIOUS RECURRING ATTEMPTS.

In February, 1876, The Philadelphia & Reading Railroad Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Delaware & Hudson Company, and The Pennsylvania Coal Company (controlling the Erie & Wyoming Valley Railroad) agreed to pool

during that year the shipments of anthracite to competitive points and to sell at uniform prices. (The Facts Established, *supra*, p. 53.)

In 1878 and 1879 similar agreements between the same parties were in force. (*Ibid.*, *supra*, p. 55.)

In December, 1884, these companies and New York, Lake Erie & Western Railroad Company (predecessor of Erie Railroad Company), The New York, Susquehanna & Western Railroad Company, and Pennsylvania Railroad Company agreed to pool in stated proportions the anthracite tonnage moving to competitive points for the period January 1, 1885, to March 31, 1886. (*Ibid.*, *supra*, p. 57.)

In March, 1886, the same companies agreed to pool such tonnage from March 31, 1886, to March 31, 1887, and to advance the price of anthracite at New York 25 cents a ton. (*Ibid.*, *supra*, p. 57.)

In 1892 the Central Railroad of New Jersey and the Lehigh Valley Railroad were leased for a long term by the Philadelphia & Reading Railroad, and at the same time The Lehigh Valley Coal Company and The Lehigh & Wilkes-Barre Coal Company, whose capital stocks were owned by the two first-named railroads, respectively, contracted to sell the output of their mines to The Philadelphia & Reading Coal & Iron Company, the entire capital stock of which was owned by the Philadelphia & Reading Railroad, thereby combining under one control the three principal carriers and producers of anthracite, together transporting 50 per cent of the total tonnage and controlling over 75 per cent of the total supply. (*Ibid.*, *supra*, p. 58.)

This combination, which was followed by a substantial increase in the price of coal (*Ibid., supra*, p. 59), was declared unlawful on the ground, among others, that it "tends to a disastrous monopoly in coal" which "portends the greatest danger to the public welfare." (*Stockton, Attorney-General*, v. *Central R. Co. of N. J.*, 50 N. J. Eq., 52, 84, 85, 491.)

In 1896 all the initial carriers of anthracite, including, besides defendant railroads, the Pennsylvania Railroad, the New York, Ontario & Western Railway, and The Delaware & Hudson Company, agreed to pool the anthracite tonnage in stated proportions known as the "presidents' percentages." (The Facts Established, *supra*, pp. 59–61.)

Conceding, as defendants' claim, that this agreement was not observed after the first year, or not at all, it is none the less evidence, along with other like acts above narrated, of the purpose or design of the principal defendant railroads to control the trade in anthracite (*United States* v. *Standard Oil Co.*, 173 Fed., 177, 184; aff. 221 U. S., 1, 45, 75, 76; *United States* v. *du Pont de Nemours & Co.*, 188 Fed., 127, 134; 8 Cyc., 676–78, 684, 685); and that is all we claim for it.

As regards the admissibility of these earlier agreements and combinations as evidence Judge Gray, speaking for himself, observed (1 R., 418):

> Nor can we agree that the abortive or abandoned attempts by the defendants, or some of them, to come to agreements or arrangements in 1876, 1884, and 1886, even if admitted to be of a character now denounced by the Act of July 2, 1890, have any evidential bearing, remote or otherwise, upon the charge now being considered by the Court. In the

> first place the several acts referred to were legal when made. They certainly violated no Act of Congress then in force; and in the second place were abandoned long before the passage of the Act now under consideration.

But in *United States* v. *du Pont de Nemours & Co.* (*supra*), a later proceeding under the same Act, it was held, with his concurrence, that (p. 134)—

> We are not debarred, however, from considering the methods by which interstate commerce in explosives may have been controlled before the enactment of that law [Antitrust Act], for it may be that an examination of those methods will disclose facts which will materially aid us in determining the purpose of the trade agreements and the incorporations that followed the enactment of the law, and the real relations of the defendants when this suit was commenced. *Standard Oil Co.* v. *United States*, decided May 15, 1911.

(2) THE ASSOCIATION SINCE 1899 OF DEFENDANT RAILROADS AND THEIR AFFILIATED COAL COMPANIES IN THE TEMPLE IRON COMPANY.

Early in 1899, by prearranged plan, defendants Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, respectively, contracted to purchase 29.96 per cent, 17.12 per cent, 22.88 per cent, 19.52 per cent, 5.84 per cent, and 4.68 per cent—in all, 100 per cent—of the capital stock of The Temple Iron Company, a corporation of Pennsylvania doing a small iron business, with assets under $75,000. Mr. Baer was its

president at the time and also a large shareholder. (The Facts Established, *supra*, pp. 95–97.)

It was not the business or assets of The Temple Iron Company that they coveted, but its charter, conferring the powers of a holding company. (Baer, 5 R., 1191; Opinion of Buffington, J., 1 R., 433, 435.)

They divided its stock amongst them in proportion to their interests in the anthracite coal business; that is, *the percentage taken by each was the average ratio of its own anthracite tonnage to the combined tonnage of all six* (Reading Company representing the Philadelphia & Reading Railway) in the five preceding years, 1894 to 1898. They have continued to own it in the same proportions, except that Reading Company has transferred a part of its holdings to its subsidiary companies, Reading Iron Company and The Philadelphia & Reading Coal & Iron Company. (The Facts Established, *supra*, pp. 103, 104.)

The presidents of defendant railroads constitute the directory of The Temple Iron Company, whilst its executive committee, vested with all the powers of the directory, is composed of the superintendents of the railroad coal companies (*Ibid.*, *supra*, pp. 106, 107).

Mr. Baer, president of Reading Company, Philadelphia & Reading Railway Company, The Philadelphia & Reading Coal & Iron Company, The Central Railroad Company of New Jersey, and The Lehigh & Wilkes-Barre Coal Company, has been its president since the acquisition of its stock by defendant railroads, except from 1899 to 1900, when he was vice-president and Mr. Watkins, of Simpson and Watkins, president. (*Ibid.*, *supra*, p. 107.)

Immediately preceding its acquisition by defendant railroads, and as part of their plan, the capital stock

of The Temple Iron Company had been increased from $240,000 to $2,500,000, and an issue of bonds to the amount of $3,500,000 authorized, which defendant railroads guaranteed, principal and interest, in the same proportions in which they purchased the stock. (*Ibid., supra*, pp. 95–97.)

In 1898, as a last means of escape from extortionate and discriminatory rates, a number of independent producers, among them Simpson and Watkins, had united in support of a projected competing railroad route from the coal fields to tidewater. (*Ibid., supra*, p. 93.) The proposed road, as found by Judge Buffington, in whose conclusion on this branch of the case Judge Gray concurred, "threatened competition in the anthracite interstate trade in buying, carrying and selling coal" (1 R., 431).

It was in this connection that The Temple Iron Company was first called into use by defendant railroads as their joint instrument to control the anthracite trade. They caused it to acquire from Simpson and Watkins, with the proceeds of its newly issued stock and bonds, the capital stocks of Northwest Coal Company, Edgerton Coal Company, Sterrick Creek Coal Company, Babylon Coal Company, Mount Lookout Coal Company, Forty Fort Coal Company, and Lackawanna Coal Company, Limited, which owned and operated eight collieries in the Wyoming region, having a combined production in 1898 of 1,302,579 tons. (The Facts Established, *supra*, pp. 94, 95.)

The output of these collieries, which had grown to 2,053,824 tons in 1907 (Govt. Ex. No. 169, 3 R., 416), has always moved in interstate commerce, New York Harbor being its principal market. (The

Facts Established, *supra*, p. 105; Opinion of Buffington, J., 1 R., 437, 438.)

Thereafter, through contracts which they caused to be made with their affiliated coal companies, defendant railroads secured to themselves in perpetuity the transportation of this tonnage in the same proportions as before its threatened diversion. (The Facts Established, *supra*, p. 101.)

The support of these collieries being lost, the projected competing road collapsed. (*Ibid.*, *supra*, p. 98.)

That an object of this combination was to prevent the construction of the proposed competing railroad and permanently to apportion the tonnage from these collieries among the defendant roads in the proportions in which they had theretofore carried it, is admitted by officers of the latter. (*Ibid.*, *supra*, pp. 98–100.) And a majority of the Circuit Court expressly found that its "avowed and conceded purpose" was to defeat the proposed road. (Opinions of Gray and Buffington, JJ., 1 R., 423, 431, 435.)

But the continued union of these defendant railroads and their affiliated coal companies in The Temple Iron Company evidences more.

It evidences a combination which, from its nature, is "unreasonably restrictive of competitive conditions" in the whole anthracite trade, and therefore restrains and monopolizes it. (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 58, 65; *United States* v. *American Tobacco Co.*, 221 U. S., 106, 179.)

The Temple Iron Company is a holding corporation which acquired with the credit of its railroad stockholders, and still owns, the stocks of the seven beforementioned independent companies operating eight collieries, the production of which in 1907 was

2,053,824 tons. (The Facts Established, *supra*, pp. 96, 105.)

> That the Temple Iron Company is a mere holding company, the instrument for effecting the purpose of the combination, is apparent from the proof, and, indeed, as we have seen in the testimony of Mr. Baer [5 R., 1191], is conceded (Opinion of Buffington, J., 1 R., 435).

Through their ownership of the stock of the holding company defendant railroads have of course eliminated all competition amongst the seven formerly independent coal mining companies and between these and their own coal companies in the production and sale of anthracite in interstate commerce. This, too, was an intended result, Vice-President Kerr of the New York, Ontario, & Western, which was invited to join the combination, testifying that one of its objects was to "control a larger percentage of the coal mined" (2 R., 171, 172).

If The Temple Iron Company, as the instrument of defendant railroads, may acquire the stock of seven independent coal-mining companies with a production of 2,000,000 tons and remove them from the field as competitors of the railroad coal companies, why may it not acquire control of all the independent mines in the coal region? Judge Buffington answers (1 R., 435):

> If this combination, which the proofs show was made by all these defendant railroads, is not within the prohibition of the statute, what legal bar is there to these railroads, through the agency of The Temple Iron Company, jointly and in combination, absorbing the remaining anthracite coal not now owned by their subsidiary coal companies? There is none.

In still another view The Temple Iron Company evidences a combination to control and monopolize trade in anthracite coal.

Here are six competitive railroads, transporting 77 per cent of the anthracite moving from the mines, and through their respective affiliated coal companies, also competitive, owning or controlling 87 per cent of the total supply and marketing 64 per cent of the annual production, all banded together as sole stockholders of another corporation engaged in the same business, each holding such stock *in the ratio of its own individual tonnage to the aggregate tonnage of all six,* with their presidents meeting regularly as directors of such corporation and the superintendents of their coal companies as its executive committee.

The necessary result is to suppress competition amongst the confederates; for corporations engaged as partners in a business in which they are also engaged singly have a common interest which would stifle any real competition amongst them. And so Judge Buffington holds (1 R., 437, 441):

> Of the office of this holding Temple Iron Company, it may be here said, as was of the combination using the Northern Securities Company in that case, that it is one which "restrains interstate commerce through the agency of *a common corporate trustee designated to act for both companies in repressing free competition between them.*"
>
> * * * * *
>
> Moreover, in this case it is not only because the combination in The Temple Iron Company was originally illegal, but because it can be used in the future as it has been in the past,

and because its existence to-day tends to forbid, prevent, and restrain competition that this Court should decree such illegal combination should end.

Finally, the purpose of the combination of defendants through The Temple Iron Company was to control and monopolize the trade in coal.

Obviously, this combination is not an instance of "those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free," and which, therefore, it may be inferred, were "entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade." (*United States* v. *American Tobacco Co.*, 221 U. S., 106, 181; *Standard Oil Co.* v. *United States*, 221 U. S., 1, 58.)

On the contrary it is on its face abnormal, unusual, unnatural, "inconsistent with the theory that it was made with the single conception of advancing the development of business power by usual methods," and being of such character will be presumed to have been formed with the purpose to control and monopolize trade, since that was its necessary tendency. (*United States* v. *American Tobacco Co.*, *supra*; *Standard Oil Co.* v. *United States*, *supra*.)

Confirmation of this purpose is found in occasional entries in the minutes of the directors of The Temple Iron Company, showing that the presidents of defendant railroads and their affiliated coal companies, while meeting professedly as such directors, at the same meetings considered matters not related to the business of The Temple Iron Company at all but to the regulation and control of the trade as a whole.

In the minutes of one of their first meetings there is an entry disclosing exactly what was on foot (Law, 2 R., 345):

> After considering the proposition to establish a statistical bureau in New York for the purpose of keeping records of all matters of interest to the anthracite coal companies, the quantities to be mined each month, the prices, and so forth, it was, upon motion of Mr. Maxwell, seconded by Mr. Thomas, unanimously resolved,
>
> That the questions embodied in the suggestions as to a bureau of statistics and disposition of surplus coal be referred to a committee of three, of which the president shall be chairman, to report on the practicability of the suggestions, and, if found practicable, to report a detailed plan.

Again, at a meeting June 27, 1900 (Law, 2 R., 349)—

> The Temple Iron Company, with the approval of the Erie Railroad Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna & Western Railroad Company, and The Central Railroad Company of New Jersey, have appointed W. A. May, of the Erie Railroad Company; W. A. Lathrop, of the Lehigh Valley Railroad Company; E. E. Loomis, of the Delaware, Lackawanna & Western Railroad Company; W. J. Richards, of The Central Railroad Company of New Jersey, an executive committee.

The members of this committee, which meets every two weeks, are not connected with The Temple Iron Company, but are officers of the railroad coal companies and in reality of the railroads, as the phraseology of the resolution recognizes. (Law, 2 R., 350.)

Could more cogent evidence be wished of the illegitimate purpose of The Temple Iron Company? Here is a corporation whose executive committee, vested with all the powers of its directory, is constituted of men not only not its officers, directors, or stockholders, nor otherwise connected with it, but who are actually the managers of its principal competitors. (Law, 2 R., 350, 351; Govt. Exs. Nos. 106, 107, 3 R., 193, 194.)

Again at a meeting held July 2, 1901, it was (Law, 2 R., 346)—

> *Resolved*, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell, and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent rate to outside shippers, or a flat rate; and if so, what rate.

"Outside shippers" were independent operators who did not sell their coal to the railroad coal companies. (Law, 2 R., 346; Cumming, 2 R., 371.)

Although supposedly this was a committee to act for The Temple Iron Company its members were not connected therewith in any capacity. They were operating officers of the railroads or the railroad coal companies! (Cumming, 2 R., 370.)

Mr. Thomas, testifying in respect to this resolution, protested that "The Temple Iron Company has no more to do and had no more to do with the question of transportation than this hotel keeper has." (5 R., 1094.) Precisely, and it is just that which makes the thing so damaging as evidence that the purpose of defendant railroads and their coal companies in combining through The Temple Iron Company was to make it their instrument to control the trade.

At the meeting of July 30, 1901 (Law, 2 R., 347)—

> A letter from Mr. J. B. Dickson was presented, requesting consideration of certain conditions affecting the sale of coal at Boston and vicinity, but the consensus of opinion was that it was not within the province of The Temple Iron Company to act upon questions of this character.

Mr. Thomas could not "explain that any more than the other" (meaning by the other the appointment of the committee on rates to outside shippers), but stated that his impression was that it referred to a request of Dickson & Eddy, the selling agents of part of the output of Northwest colliery, for a reduction in price on account of the inferior quality of the coal. (5 R., 1095.) He must be mistaken, because the recital is that the matter under consideration "was not within the province of The Temple Iron Company"; but surely the price at which it should sell its own coal *would* have been.

At a meeting September 17, 1901 (Law, 2 R., 348)—

> A communication from Messrs. Dickson & Eddy relative to the 5-cent differential was presented by Mr. Fowler, and the following motion was adopted:
>
> Moved and seconded that the communication of September 12, 1901, from Messrs. Dickson & Eddy, addressed to and presented to the meeting by Mr. Fowler, relative to the 5-cent differential, be referred to the sales agents to investigate and report.

"The 5-cent differential" refers to the difference in the price at the upper and lower ports of New York Harbor. (The Facts Established, *supra*, p. 51.) The sales agents alluded to were those of the railroad

coal companies, as The Temple Iron Company had none, its coal being sold at the mines.

At a meeting October 8, 1901 (Law, 2 R., 348, 349)—

> The president presented a letter from Mr. W. W. Ruley, wherein he asked for extra compensation, stating that, owing to the increase in the services required of him, the present allotment was inadequate.
>
> On motion, duly carried, the question was referred to Mr. Baer, with power to act.

Mr. Ruley was not employed by The Temple Iron Company and it made no payments to him. (Law, 2 R., 349, 492.) He was employed by defendant railroads to keep a record of shipments of coal and average prices at tidewater upon which settlements were made under the 65 per cent contracts (Ruley, 2 R., 55, 67), and for other purposes.

It is not to be supposed that the *recorded* instances of such use of the directory of The Temple Iron Company by defendant railroads and their coal companies were the only ones. The more natural supposition is that these were a few out of many and were written in the minutes through inadvertence.

The failure of the minutes to disclose any such instances after 1901 is therefore of little significance, the less so because in 1902 The Temple Iron Company was attacked before the Interstate Commerce Commission as an unlawful combination. (Law, 2 R., 355, 356; Govt. Ex. No. 159, 3 R., 332.) The important fact is that these defendants, the principal carriers of anthracite, and through their subsidiary companies, the principal producers, continue joined through this Temple Iron Company, and through it their presidents continue regularly to meet. Competition can not live under such conditions.

In the Court below it was strongly urged for The Temple Iron Company that the fact that it was offered other mines and refused them proves that it was not being used by defendant railroads as their instrument to control the trade. (See its brief below, p. 28.) The monopoly of defendant railroads is so nearly complete that absence of a desire for any further acquisitions would be without significance in any event. The fact is, however, that counsel for The Temple Iron Company proved by his own witnesses, officers of the company, that it did not acquire these additional mines "because the price was entirely too high." (Baer, 5 R., 1198; May, 4 R., 325.)

Were there no other evidence the Government would confidently maintain that the union of defendant railroads and their affiliated coal companies in The Temple Iron Company with the purpose and effect above set forth alone establishes the charge of a General Combination by them to control and monopolize trade among the States in anthracite.

(3) THE ASSOCIATION OF DEFENDANT RAILROADS, THEIR AFFILIATED COAL COMPANIES, AND THE OTHER DEFENDANTS, IN THE SYSTEM OF IDENTICAL CONTRACTS KNOWN IN THE RECORD AS 65 PER CENT CONTRACTS.

It is undisputed that in 1900, after the union of defendant railroads and their affiliated coal companies in The Temple Iron Company, there were protracted meetings between a committee consisting of the president or other high official of each defendant railroad and its affiliated coal company and a committee representing the independent operators, at which a form of contract was agreed upon to be en-

tered into by the coal company of each road with independent operators along its line. (The Facts Established, *supra*, pp. 64–65; Opinions of Buffington and Lanning, JJ., 1 R., 439, 458, 459.)

The form, which is annexed to the petition (1 R., 29; McAnulty, 2 R., 316, 317), provides—

(*a*) that the seller shall "deliver on cars at breaker to the buyer *all the anthracite coal hereafter mined from any of its mines* now opened and operated, or which it may hereafter open and operate on the premises intended to be covered by this contract, and any which shall be reclaimed from culm banks on said premises";

(*b*) "shipments to be made from time to time *as called for by the buyer*," the latter "to take the coal in as nearly equal daily or weekly quantities *as in its judgment the requirements of the market will permit;*" with a promise that in calling for shipments the buyer will not discriminate "but that the quantity to be ordered monthly shall be a just proportion of the entire quantity of coal agreed to be purchased by the buyer, * * * it being understood that so far as practicable *the quantity ordered shall not be less than a just proportion of all the anthracite coal which the requirements of the market may from time to time demand;*

(*c*) "*the buyer to use its best efforts to find a market for the seller's coal* so as to enable the seller's collieries to be worked as many days as practicable, *with due regard to the general market conditions*, and to give orders for shipments which will enable the seller to work its collieries as many days in each year *as other collieries work similarly situated;*"

(*d*) the prices to be, "for all sizes above pea coal, 65 per cent of the general average free on board prices of said sizes [from the same trade region] received at tide points at or near New York, between Perth Amboy and Edgewater," and for the smaller sizes, percentages in proportion, the said general average prices at New York Harbor to be computed by a disinterested expert accountant. [Italics ours.]

It is said for defendants that they did not "bind" themselves not to enter into contracts of this sort except in the agreed form. This is unimportant. But one of their counsel brought out the fact that the representatives of both sides at the meeting at which the form was determined "did recommend that if contracts were entered into, they be entered into substantially in the form reached by that conference." (Howe, 2 R., 224.) And the witness Simpson testified, without contradiction, that the railroad coal companies refused to make contracts for the purchase of the product of mines in which he is interested except for the life thereof as provided in this form (2 R., 447).

Contracts in the agreed form, known as 65 per cent contracts, were made by the coal departments or subsidiary companies of defendant railroads with independent operators along their respective lines having a production in 1907 of 6,003,139 tons—nearly half the total production in that year of all the independents combined. (The Facts Established, *supra*, p.68.)

When a railroad coal company and an independent made one of these contracts each knew that it was one of an identical series, because the form had been fixed by the joint action of their representatives. Moreover, the form itself gave notice of that fact.

The form having been agreed upon at meetings between representatives of the railroads and railroad coal companies on the one side and of the independent operators on the other, the parties to each knowing that theirs was one of an identical series, and a common agent having been appointed to compute the purchase price, it follows that such contracts are connected as parts of a plan. (*Swift & Co.* v. *United States*, 196 U. S., 375; *Shawnee Compress Co.*, v. *Anderson*, 209 U. S., 423; *Continental Wall Paper Co.* v. *Voight*, 212 U. S., 227; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373.)

In *Dr. Miles Medical Co.* v. *Park & Sons Co.* (*supra*), a series of identical contracts between a manufacturer and retail dealers to whom he sold, binding the latter to resell at specified prices and containing other restrictions, were considered together as parts of a plan and in that light condemned as in violation of the Act of Congress, although one such contract standing alone would doubtless not have been bad (Opinions of Hughes and Holmes, JJ., 220 U. S. 407, 411). Manifestly, such contracts would not have been any the less parts of a plan had they been made by two or more manufacturers who had previously agreed upon the form. It was said in that case by Mr. Justice Hughes, speaking for the Court, that—

> the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other (p. 408).

Just so, these railroads and railroad coal companies can fare no better with their plan of identical con-

tracts than if they achieved the same result by forming a combination and agreeing to purchase the independent output at the same uniform prices and upon the same restrictions as to production as the contracts specify.

These are not mere contracts to purchase coal; nor even to purchase the total output of a mine.

On the one hand, the vendee railroad coal company is not bound to take all the mine can produce, nor any definite amount whatever. How much it will take rests with it to decide, on its own judgment of market conditions. At a price that would yield a moderate profit a ready market might be found for all the mine can produce; yet the railroad coal company is not bound to take any more than it can resell at the price it chooses to demand. On the other hand, the independent operator is prohibited from selling to anyone else. If the railroad coal company will not take all he can or wishes to produce, he must shut down. He can not produce more and market the excess through other channels. The operation of his mine is thus completely under the control of the vendee railroad. (Opinions of Buffington and Lanning, JJ., 1 R., 439, 462.)

In maintaining the proposition (next after this) that they constitute in themselves an unlawful restraint of trade, without regard to the General Combination, we have examined much further into the nature and effect of the 65 per cent contracts. (*Infra*, pp. 206-236.) In that discussion it is shown that they:

(*a*) Permanently suppress competition amongst defendant railroad coal companies in the purchase of the output of independent operators. (*Infra*, pp. 215, 216.)

(*b*) Necessarily tend to suppress competition amongst defendant railroad coal companies in the sale of coal to the public. (*Infra*, pp. 216, 217.)

(*c*) Permanently suppress competition between the independent operators on the one hand and defendant railroad coal companies on the other in the sale of coal to the public. (*Infra*, pp. 217, 218.)

(*d*) Permanently regulate and restrict the output of the independent operators at the will of defendant railroads or railroad coal companies. (*Infra*, pp. 218–220.)

(*e*) Permanently prevent competition amongst defendant railroads for the transportation of the output of the independent mines. (*Infra*, pp. 220–221.)

(*f*) Prevent any future attempts to break the control and monopoly of defendant railroads through an independent railroad from the coal fields. (*Infra*, p. 221.)

(*g*) Operate to give coal sold under them a preferential freight rate to tidewater and in that way draw independent operators into them, thereby securing to each defendant railroad complete control—a monopoly—of the anthracite coal production tributary to its line. (*Infra*, pp. 222–230.)

In their nature and effect as above set forth these contracts are "wholly inconsistent with the theory that they were made with the conception of advancing the development of business power by usual methods." (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 76.)

On the contrary, the careful formulation of the contracts by the defendants in concert, the insistence by defendant railroads and their coal companies, over protest, that they run for the life of the mines, their further insistence upon the right to regulate the

independent output, the imminence of competition by a new railroad supported by the independent tonnage (The Facts Established, pp. 63, 64, 67)—these circumstances, among others, lead inevitably to the conclusion that the purpose of this system of identical contracts is to eliminate the independent producers for all time as factors to be considered by defendant railroads and their affiliated coal companies in the production and sale of coal and in fixing the freight rate, thereby insuring the dominance of the latter over the anthracite industry.

It was said by Mr. Cumming, a representative of the railroads in the negotiations, that—

> it was the interest of the persons whom I represented to have the question settled once for all. (2 R., 358.)

And Judge Buffington found that (1 R., 439, 440):

> Indeed, the expiration of such seven-year contracts had made possible the projection of two carrier roads, and the testimony shows that the perpetuity clause was insisted on and inserted in the contracts thereafter by the combined action of the defendant railroads and their coal companies in order to withdraw from competition for all time the freights of these producers.

We maintain that their joining together in devising and carrying out this system of identical contracts, with the effect and purpose shown, establishes without more the charge that these defendants are all parties to a General Combination to enable defendant railroads and their affiliated coal companies to control and monopolize the production, transportation, and sale of anthracite.

And this conclusion seems irresistible when such association is considered in conjunction with the union of defendant railroads and their coal companies in The Temple Iron Company and in the light of their oft-repeated efforts to destroy competition.

Judge Buffington declared (1 R., 441):

> Seeing, then, that these six defendant railroads did unlawfully combine together, through the Temple Iron Company, and that thereafter in further combination they brought about these illegal perpetual contracts, the duty of the court seems clear to forbid them further maintaining their unlawful combination in the Temple Iron Company and from continuing these unlawful contracts. * * * Moreover, in this case it is not only because the combination in the Temple Iron Company was originally illegal, but because it can be used in the future as it has been in the past, and because its existence to-day tends to forbid, prevent, and restrain competition, that this court should decree such illegal combination should end. And this case exemplifies need of such a decree.

The defenses (1) that the 65 per cent contracts do not relate to interstate commerce, and (2) that they are but a continuation of a long-existing practice, are answered in the proposition dealing with such contracts as independent violations of the Act of Congress. (*Infra*, p. 206.)

(4) THE USE BY DEFENDANT RAILROADS AND THEIR AFFILIATED COAL COMPANIES OF THE BUREAU OF ANTHRACITE COAL STATISTICS AS AN INSTRUMENT TO SUPPRESS COMPETITION.

In 1876, The Philadelphia & Reading Railroad Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company The Delaware & Hudson Canal Company, and The Pennsylvania Coal Company, which controlled the Erie & Wyoming Valley Railroad, entered into an agreement for one year "for the government of the anthracite coal trade to competitive points." To carry it into effect a body called the Board of Control, composed of a representative of each company, was created. (Govt. Ex. No. 153, 3 R., 316; The Facts Established, *supra*, pp. 53, 54.)

John H. Jones, previously an employee of the Philadelphia & Reading Railroad, was appointed expert accountant to the Board of Control "to keep the tonnage accounts of the several companies, and to receive, examine, and report upon the tonnage returns received from each interest," and in that capacity "opened," as he testified, "what is now the Bureau of Anthracite Coal Statistics." (*Ibid.*, *supra*, pp. 54, 55.) In 1892 he was succeeded as head of the Bureau by W. W. Ruley, his assistant. (*Ibid.*, *supra*, p. 55.)

This Bureau was thus called into existence as an instrument of the principal defendants or their predecessors to control the market for anthracite coal.

The functions of the Bureau have greatly expanded. It still collects monthly from each road (including now the Pennsylvania and the New York, Ontario & Western) its anthracite tonnage transported from the

mines, and in return makes to each a monthly report of the tonnage of all. (Ruley, 2 R., 55–57.)

Since November, 1900, it has also collected from each defendant railroad coal company from month to month the quantity of each size of coal sold by it at New York Harbor, f. o. b., and the prices received. (Ruley, 2 R., 61–64, 89; Govt. Ex. No. 11, 3 R., 38.)

From these data it computes the average price per ton received by each company for each size of coal and the general average price of all for each size (Ruley, 2 R., 61–64, 89; Govt. Ex. No. 11, 3 R., 38), which general average prices are the basis for ascertaining the price to be paid for coal purchased by the railroad coal companies from independent operators, and for determining what, if any, extra wages are due the miners under the sliding scale prescribed by the Strike Commission (Ruley, 2 R., 61–65).

Thus through a common agent defendant railroads and railroad coal companies are in position to know exactly how much anthracite their competitors are transporting, how much they are selling, and the prices they are receiving (Thomas, 5 R., 1108, 1109)—a state of things inconsistent with real competition.

A striking illustration of the use of this Bureau by defendants to prevent competition and control the market came out in the testimony of its head.

He testified that in Brooklyn, naturally a highly competitive market, there was price cutting in 1901, and that thereupon the Bureau began and has ever since continued to collect monthly from each railroad coal company the amount of its sales of each size of coal in that market and the prices received therefor, compiling these into a table which has been sent monthly to each company, with the result that discrepancies

in the prices received by them at Brooklyn have dwindled to small proportions. (Ruley, 5 R., 982, 988, 990, 998.) He further testified that "it is not necessary for any purpose relating to the prices of labor or to the prices for which coal is sold * * * to compile these figures to show the sales and receipts in Brooklyn." (5 R., 990.)

Again, in 1896, when the initial carriers agreed upon a division of the tonnage, it was through this Bureau that the attempt to carry out the agreement was made. (Harris, 2 R., 27, 28.)

The head of the Bureau is paid exclusively by the carriers, the coal-producing companies contributing nothing. (Jones, 2 R., 600; Ruley, 2 R., 56, 67.)

Judge Gray states (1 R., 416):

> There does not seem to be the slightest direct proof, apart from the presumption we are asked to indulge in, of any illegal combination or contract promoted by the use of these statistics.

And yet we have just seen by the undisputed testimony of its head that since 1901, when there was an outbreak of price cutting in Brooklyn, the Bureau has been successfully employed by defendants to suppress competition amongst them in that great market.

He further states (1 R., 416):

> The reports were public, and there is not the slightest intimation of any secret correspondence between the Statistical Bureau and the defendants. This information, open to everyone, was doubtless useful in many legitimate ways to those who subscribed for and supported it.

The statement that the reports of the Bureau were made public is in the main erroneous. Whilst the

tonnages carried by each defendant railroad and the *average* prices received by all the railroad coal companies taken together are published, the compilations of statistics through which each individual company is informed of the sales and prices of its competitors are not made public. Nor are those showing the sales and prices of the railroad coal companies in Brooklyn made public.

The collection of the vital statistics of an industry is, of course, a legitimate and useful service. But it is seen from its history and operations that this Bureau goes far beyond that.

(5) THE INCREASE OF PRICES IN 1902 AND THE MAINTENANCE THEREOF AT THE HIGHER LEVEL BY THE AFFILIATED COAL COMPANIES OF DEFENDANT RAILROADS ACTING IN CONCERT.

In October, 1902, following the strike, defendants The Philadelphia & Reading Coal & Iron Company The Lehigh & Wilkes-Barre Coal Company, The Lehigh Valley Coal Company, The Delaware, Lackawanna & Western Railroad Company, Hillside Coal & Iron Company, and The Pennsylvania Coal Company, simultaneously advanced their tidewater prices on prepared sizes to a uniform level 50 cents a ton higher on the average than before. (The Facts Established, *supra*, p. 119.)

The scale then adopted has been continued in force except in April, 1906, when *all* the companies omitted the customary discount. (*Ibid.*, *supra*, p. 122.)

That this advance to a uniform level was not a coincidence but the result of united action, appears affirmatively from the testimony of Presidents Thomas and Truesdale, both admitting (Thomas, 5 R., 1113;

Truesdale, 5 R., 1145, 1146) that prior to the increase there were consultations among the companies upon the subject, and the latter admitting further (Truesdale, 5 R., 1145, 1146) that each company had foreknowledge of what the new prices of the others would be. (The Facts Established, *supra*, pp. 120–122.)

Standing alone, uniformity for the time being in the price of a commodity does not necessarily establish that this was fixed by a combination, since the prices of a commodity sold in the market by dealers in competition will be approximately the same at a given time. Nor is it contended that the existence of a combination must necessarily be inferred where one price is put into effect by all the leading dealers at the same time, for even that might be accounted for by the operation of natural laws of trade.

But where, as here, the price of the different dealers—formerly varying materially—has for some years remained uniform and unchanged, and was not only put into effect at the same time, but was an *increased* price which *followed "consultations"* amongst them in relation to prices, there, we submit, the proof is complete that the dealers conspired to establish and maintain that price.

Pea coal and smaller sizes, being used principally for steam purposes, are necessarily sold in competition with bituminous coal, over which defendants have no control. For that reason, no doubt, and also because they are generally sold under contracts running for a year (Ruley, 5 R., 993; Thomas, 5 R., 1125), no attempt apparently was made to fix a uniform price for them from month to month when the prices of the other sizes were raised and made uniform in October, 1902. Mr. Baer testified that it was for the former reason that The Philadelphia &

Reading Coal & Iron Company did not include such sizes in its new schedule then adopted (5 R., 1178). The broken or grate size is likewise sold for steam purposes in competition with bituminous coal, and consequently is sold principally under yearly contracts (Ruley, 5 R., 993; Thomas, 5 R., 1125; Henderson, 4 R., 605, 606); and therefore, although listed in the published price schedules, is not governed by them (Henderson, 4 R., 605, 606).

The average prices actually received from month to month show slight variations from the schedule, and this the defendants seize upon as evidence that there is no combination. Such variations mean little, however, for a few sales below the schedule for such special reasons as a defect in the quality of the coal or through favoritism would cause variations in the average prices, although the great body of sales had been at schedule prices. The way, of course, for defendants to have proved that the schedule prices are not maintained was to open their books and show by them, if they could, that the bulk of the sales are at material variations therefrom. This they did not do.

In explanation of what goes on between the leading coal companies before they make any changes in their standard prices, President Truesdale said that—

> it is not very different from the knowledge we all have as respect to freight rates (5 R., 1145);

and then proceeded to give an outline of the procedure by which railroads agree upon changes in freight rates. Without digressing to inquire whether this practice of railroads is unlawful or not, it suffices to say that the principal ground advanced in its defence—

that in no event can harm result because there is a governmental power to keep freight rates at a reasonable level—is inapplicable to the case of independent producers fixing their prices in concert. There has never been doubt that the latter is unlawful whether the concerted action be described as "consultations," "informal understandings," "general knowledge of what each other was going to do," or what not.

Mr. Baer's explanation of the advance to a uniform level by all the companies at the same time was that The Philadelphia & Reading Coal & Iron Company, whose cost of production he declared to be from 40 to 50 cents per ton higher than in the Wyoming region, had to make the increase in order to earn a profit, and that the other defendant coal companies were able to get the same price in accordance with the economic law, as he stated it, that "the price of the entire supply of anything necessary for a community will be regulated by the cost of production of that portion of the necessary supply which is produced at the greatest expense." (Baer, 5 R., 1170.) But this principle can have no application here, where a few have power to control production and prevent the operation of the ordinary laws of trade under fair competitive conditions, and where the limit of production has not been reached. It is not applicable merely because there is a demand for all that *is* produced—the very reason why the production is no larger may be control by a combination. In 1906 and 1907 the workers in the bituminous mines of Pennsylvania averaged 231 and 255 days, respectively; those in the anthracite mines only 195 and 220 days. ("The Production of Coal in 1906," U. S. Geolog. Sur., p. 150; same for 1907, p. 167.)

It is also said that the increased cost of production, due to the award of higher wages to the mine workers by the Strike Commission in 1902, explains and justifies the higher prices. In fact, throughout this case defendants have sought to couple that award with their defense.

Thus counsel of the Lehigh Valley companies, referring to the award of the Commission, inquired of the witness Truesdale, president of the Delaware, Lackawanna & Western Railroad (5 R., 1151):

> Q. It increased the price of prepared sizes of coal about 50 cents, did it not, to consumers throughout the country approximately?—A. Yes, sir.

The answer to this suggestion is that the award must be taken as adjudging that, *on the basis of trade conditions, including prices, prevailing at that time,* it was just and fair, alike to producers and to their workmen, that the latter should receive the higher wages. (Bul., Dept. Labor, No. 46, p. 497.)

The increase in wages awarded was such, employing the words of the Commission, "as in its judgment is fair to both operator and mine worker." (*Ibid.*) Manifestly fair to the operator, not on the basis of higher prices, but on the basis of those existing when the strike was instituted.

To deny this is to say that the Commission licensed the mine owners to charge consumers higher prices to compensate for the higher wages; that the award was not that the mine owners should pay the increase in wages, but that the public should.

But suppose such had been the award. The defendants must still be convicted of exacting more than their due. For, taking the results as given

from their own books, the increase in the cost of production for the entire decade, 1898 to 1908, in which occurred not only the wage increase of 1902, but that of 1900 also, has been only 22 cents per ton in the Northern field and 32 cents in the Southern (The Facts Established, *supra*, p. 131), whereas the increase in price in that period has been several times greater (Ibid., *supra*, p. 132; also *infra*, pp. 204–205).

The unusual reduction of output, due to the strike, might account for a temporary rise in prices, but it does not explain their continuance at the higher level after production had again become normal and potentially in excess of the demand.

(6) AN INCREASE IN THE PRICE OF ANTHRACITE SINCE 1898 OUT OF ALL PROPORTION TO THE INCREASE IN THE COST OF PRODUCTION.

The price of anthracite has increased since 1898 out of all proportion to the increased cost of production.

Take, for example, The Philadelphia & Reading Coal & Iron Company, whose collieries are in the Southern field, where mining is by far the most expensive. (Baer, 5 R., 1176.) The increase in its cost of production from 1898 to 1908 was 32 cents a ton. (Richards, 5 R., 696.) On the other hand, since that year the prices actually received by it at the mines have increased $0.85 a ton on the broken or grate size, $1.04 on egg, $1.01 on stove, $1.25 on chestnut, $0.62 on pea, $0.55 on buckwheat, and $0.30 on rice. (Brown, 2 R., 707.) An exhibit offered by the Philadelphia & Reading Railway of the operations of typical collieries in the Southern field shows that in 1908 sizes above buckwheat coal constituted 68.84 per cent of the total shipments and the sizes above rice 86.09 per cent. (6 R., 380.)

Again, take The Delaware, Lackawanna & Western Railroad Company, whose mines are located in the Northern field. Its cost of production increased 22 cents a ton from 1898 to 1908 (The Facts Established, *supra*, p. 131), while from 1900 to 1908 (the figures for 1898 are not in the record) its selling price at New York Harbor has increased $1.50 a ton on broken and egg sizes and $1.00 a ton on stove and chestnut (Ibid., *supra*, p. 132).

(7) THE ACQUISITION IN 1901 BY SEVERAL OF THE DEFENDANT RAILROADS IN UNISON OF SHARES OF ONE OF THEIR OWN NUMBER AND A COMPETITOR, LEHIGH VALLEY RAILROAD COMPANY, AND THEIR CONTINUED ASSOCIATION AS SHAREHOLDERS THEREOF UNTIL AFTER THE PETITION WAS FILED.

In 1901 large blocks of the stock of their competitor, the defendant Lehigh Valley Railroad Company, were purchased in unison by Reading Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, and Erie Railroad Company, defendants, and by the Lake Shore & Michigan Southern Railway Company, largest stockholder of Reading Company; following which Mr. Baer and other officers of the purchasers were elected to the board of directors of Lehigh Valley Railroad Company, thereby further strengthening the community of interest among the defendants. (The Facts Established, *supra*, pp. 117–119.)

Mr. Baer testified that these purchases were made to save the credit of the Lehigh Valley Railroad.

But was it an accident that the same defendants that combined, as alleged, to save the credit of the Lehigh Valley were, including the Lehigh Valley itself, the ones then as now combined in The Temple Iron Company and the 65 per cent contracts—the very ones that joined forces to defeat the independent railroad?

The Erie, reporting to its stockholders, gave a version of the purpose that differs from Mr. Baer's (2 R., 577):

> An opportunity having been presented to your board to secure an interest in the stock of the Lehigh Valley Railroad Company, *and believing that it would promote generally a better understanding and greater harmony between the managements of the two companies*, as well as ultimately return a profit upon the investment, it was deemed wise to make such purchase. [Italics ours.]

Since the purchase was in unison, the others presumably had a like purpose. The fact that some of defendants have parted with their holdings since this case was started takes nothing from the transaction as evidence of a combination.

IV.

THE 65 PER CENT CONTRACTS, WHETHER CONSIDERED AS PARTS OF A PLAN OR SINGLY, RESTRAIN AND MONOPOLIZE TRADE AND COMMERCE AMONG THE STATES IN ANTHRACITE COAL, IN VIOLATION OF THE ACT OF JULY 2, 1890.

The 65 per cent contracts have been previously considered as proof of the General Combination. We are now to consider them as transactions in them-

selves unlawful. At certain points their two aspects overlap, making some repetition unavoidable.

The petition (paragraph VIIa) charges that in 1900, upon the termination of certain short-term contracts,

> defendant carriers, either directly or through * * * their said subsidiary companies * * * in pursuance of a previous agreement between themselves, severally offered to make and did make and conclude with nearly all the independent operators along their lines new contracts containing substantially uniform provisions agreed upon beforehand * * * in concert; * * *. That * * * the independent operator who entered into one of these contracts realized upon his coal from 15 to 50 cents more a ton, approximately * * * than was realized by the independent operator who shipped his coal to tidewater on his own account, paying the published rates of transportation himself, * * * The result of this arrangement, as was intended, was to draw, if not to force, the great majority of the independent operators into making the aforesaid contracts, thereby enabling the defendant carriers and their subsidiary companies—the defendant coal companies—to control absolutely and until the mines are exhausted the output of most of the independent anthracite mines, * * *. (1 R., 18, 19.)

Annexed to the petition is a copy of the form of contract. (1 R., 29.)

The petition prays that it be adjudged that these "are contracts in restraint of trade and commerce among the several States," that the parties be en-

joined from performing them and from making any of like effect, and for general relief. (1 R., 25, 28.)

In their several answers defendants, The Philadelphia & Reading Coal & Iron Company, The Lehigh Valley Coal Company, The Delaware, Lackawanna & Western Railroad Company, The Lehigh & Wilkes-Barre Coal Company, Hillside Coal & Iron Company, and The New York, Susquehanna & Western Coal Company, admit having made contracts substantially in the form set forth in the petition (1 R., 70, 71, 100, 101, 107, 108, 110, 119, 121, 123), but aver that they were the outgrowth of custom and were not entered into with the purpose or effect alleged or in pursuance of any agreement or combination (1 R., 70–72, 98–101, 107–108, 110, 119, 121–123).

The independent operators who are parties to them were made defendants as soon as discovered (1 R., 38), and with unimportant exceptions answered, admitting the execution of the contracts, but denying that they were entered into with the purpose or effect alleged or in pursuance of any agreement or combination. (1 R., 174 *et seq.*)

Whilst the charge in respect of the 65 per cent contracts was dismissed (1 R., 468), only one member of the Court, Judge Gray, held them not in violation of the Act of Congress (1 R., 418), and apparently he did so by construing them as mere contracts to buy the entire product of a mine (1 R., 418)—a construction rejected by both of his colleagues and at variance, we think, with their terms and the operations under them.

Judge Buffington held just the opposite (1 R., 441):

> To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding then that they are in the words of the statute "contracts * * * in restraint of trade or commerce among the States," I record my dissent to the action of the Court in refusing to enjoin them.

Judge Lanning, reading the petition too narrowly, we think, in view of the rule "that a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago" (*Swift & Co.* v. *United States*, 196 U. S., 375, 395), held that it did not put in issue the legality of the contracts but only whether they "were devised and are maintained by an unlawful combination"; and finding they were not, he concurred in dismissing the charge without considering whether they violate the Act (1 R., 463).

In another place we have examined this view of the issue. (*Infra*, pp. 258–260.) It suffices now to say that it appears to us contrary to the allegations and prayer of the petition, contrary to the view of the issue held by defendants as disclosed in their answers (1 R., 72, 82, 89, 101, 108, 110, 119, 120, 123), and contrary to the position taken by Judge Lanning's associates, both of whom considered the legality of the contracts, one holding that they are not violative of the Act (1 R., 418), the other that they are (1 R., 441).

The Circuit Court, while dismissing the petition as to them, thus did *not* decide that the 65 per cent contracts do not violate the Act of Congress.

Its dismissal of the petition as to them was assigned as error by the Government. (Assignment IV, 1 R., 471.)

A history of the 65 per cent contracts is given in the statement of facts, where it is shown that their provisions are identical and were agreed upon in protracted meetings between a committee consisting of the president or other high official of each defendant railroad and its allied coal company and a committee representing the independent operators. (The Facts Established, *supra*, pp. 64–66.) This much is beyond dispute.

Thus Judge Buffington found (1 R., 439):

> that the terms of these contracts were agreed upon by the joint action of the six defendant railroads, their subsidiary coal companies and mine owners, and that all of said persons and companies were concerned in and were thereby affecting interstate commerce.

And Judge Lanning that (1 R., 459):

> This proves conclusively that the representatives of the subsidiary coal companies did agree upon the form of the contracts before any of them were actually signed. * * * Unquestionably, however, the carriers had an interest in the negotiations, and, as they were officers of both the carriers and their subsidiary coal companies, they must be considered as having represented both.

The important provisions of the agreed form are set out above (pp. 189–190).

It is said that defendants did not "bind" themselves not to enter into contracts of this sort otherwise than in the agreed form. This is unimportant. But the representatives of both sides at the meeting at which the form was determined "did recommend that if contracts were entered into, they be entered into substantially in the form reached by that conference." (Howe, 2 R., 224.) And Simpson testified, without contradiction, that the railroad coal companies refused to make contracts with him except for the life of the mine. (2 R., 447.)

Contracts in the agreed form were made with independent operators having a production in 1907 of 6,003,139 tons. This was nearly half the total production in that year of all the independents combined, after deducting the amount purchased by railroads and railroad coal companies not defendants. (The Facts Established, *supra*, pp. 68–69.)

Parties to these contracts each necessarily knew that his own was one of an identical series, since the form had been fixed by the joint action of their representatives. Moreover, the form itself gave notice of that fact.

The form having been agreed upon at meetings between their representatives, the parties to each knowing that theirs was one of an identical series, and a common agent having been appointed to compute the purchase price, it follows that such contracts are connected as parts of a plan. (*Swift & Co.* v. *United States*, 196 U. S., 375; *Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *Continental Wall Paper*

Co. v. *Voight*, 212 U. S., 227; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373.)

In *Dr. Miles Medical Co.* v. *Park & Sons Company* (*supra*), a series of identical contracts were considered together as parts of a plan and in that light condemned as in violation of the Act of Congress, although one standing alone would doubtless have been innocent. (Opinions of Hughes and Holmes, JJ., 220 U. S., 407, 411.)

It was said in that case by Mr. Justice Hughes, speaking for the court, that—

> the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other (p. 408).

These railroads and railroad coal companies can fare no better with their plan of identical contracts.

We shall endeavor first to establish that within the meaning of the statute these contracts restrain and monopolize trade and commerce; second, that the trade and commerce so affected is not confined to Pennsylvania, but is a part of the current of interstate commerce; and, third, that the grounds on which the contracts are defended are without merit.

First. It is written on their face that an independent operator making one of these contracts becomes absolutely bound to the so-called buyer, the railroad coal company. The latter does not undertake to purchase any definite quantity of coal, but only so much as in *its* judgment the conditions of the market from month to month justify the seller in producing. Nor is the seller at liberty to produce more and sell to

some other purchaser. He must sell only to the railroad coal company and can produce only what the latter, apportioning its calls justly amongst all the mines, will take.

And these contracts establish this condition for the entire life of the independent mines.

If it be asked why any independent operator would make such a contract, one reason at least lies on the surface. The price offered at the time the provisions were agreed upon yielded materially more than could have been obtained had the coal been shipped by the operator at the published freight rates to either of the principal markets, New York and Philadelphia. (The Facts Established, *supra*, p. 72.) The railroad coal company was able to offer this price and sustain the consequent loss because of its union with the railroad, which could deduct from the freight received the loss on the purchase and still have a profit on the whole transaction.

Doubtless another influence with the independent was that he brought himself into a community of interest with those who dominate the trade.

These contracts were thus analyzed by Judge Buffington (1 R., 439, 440):

> Under each of these contracts the entire product of a particular mine was sold until exhaustion to one of the subsidiary coal companies at the breaker, and shipments therefrom were only to be made as that company required. Not only had the owner no power to mine except as the buyer required, but he had nothing to do with fixing the price, which was determined by the general tidewater rate. * * *. The result of the combination

was the operators got a raise to 65%, and the defendant railroads eliminated competition.

And by Judge Lanning as follows (1 R., 462):

> Not only have the buyers the right, under these contracts, to all the coal that the sellers' collieries shall ever produce, but they alone are the judges of the requirements of the market, they alone determine when calls for deliveries by the sellers shall be made, and they alone determine what shall be the sellers' "just proportion of all the anthracite coal which the requirements of the market may from time to time demand." Here is something more than mere acquisition of property. It is a plan for future acquisition of property and future regulation of the supplies to be furnished by the subsidiary coal companies and the selling companies.

Already it is seen that these are not mere contracts for the purchase of coal but are parts of a most ingenious plan by which the railroad coal companies acquire the output of the independent mines until exhausted without competition amongst themselves or from other de[illegible]s, and the right to regulate the same according to their own view of what the market will take, thereby eliminating the independent producers once for all as factors in fixing the price and the freight rate. As observed by Judge Buffington, if such contracts—

> do not fall within the ban of a statute "aimed," as was said in *Chesapeake & Ohio Fuel Co.* v. *United States* (*supra*), to "maintain interstate commerce on the basis of free competition," then that statute is made of no avail by contracts which shut out competition for all time, and which if increased in number,

may, without absolute purchase and ownership, end in the defendant railroads' acquisition of the remaining coal area. (1 R., 440, 441.)

But let the analysis proceed further.

(1) If A, B, and C, dealers in a commodity, agree on a form of contract under which to purchase their supplies, the form containing among other provisions a schedule of uniform prices to be paid, and thereafter each enters into contracts in the agreed form, certainly their plan of identical contracts can fare no better than if they did what would less effectively accomplish the same purpose, namely, agreed amongst themselves on a uniform price and other uniform terms at which to purchase. (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373, 408.) If, therefore, the 65 per cent contracts expressed nothing more than a plan by which the dominant producers of a commodity purchase the output of smaller producers at a uniform price, without competition, plainly they would be in restraint of trade, for it is long-settled law that independent dealers may no more league together to fix a price at which to buy than to fix a price at which to sell. (*Cousins* v. *Smith*, 13 Ves., 541 [1807]; *Swift & Co.* v. *United States*, 196 U. S., 375 [1905].) In *Swift & Co.* v. *United States* "a combination of independent dealers to restrict the competition of their agents when *purchasing* stock for them in the stock yards" was held in restraint of trade. In the present case competition amongst the buyers is stifled until the product of the sellers is exhausted.

If it is unlawful for dealers to agree upon a price at which to purchase, it can not alter the case that

some or all of the prospective vendors participate in the negotiations leading to that result. They may have done so from the necessities of their position or collusively with the vendees for the common profit of both at the expense of consumers. It is no answer, therefore, to say that here the price was proposed by the vendors and accepted only reluctantly by the vendees. The important, the controlling, consideration is that it was accepted by the vendees, the masters of the situation, in concert; it was their joint action which actually fixed the uniform price and shut out any possibility of competition amongst them. And what is more (though their action was unlawful without this), the purchasers here adopted the price proposed only upon conditions which made that the price for all time, which bound to them exclusively the output of the vendors, and which left it to them to determine what that output should be. (The Facts Established, *supra*, pp. 64–65.)

But it is perhaps the least of their offending that the 65 per cent contracts suppress competition amongst defendant coal companies in the purchase of 6,000,000 tons of coal a year.

(2) Their necessary tendency and one of the special ends intended is unduly to suppress competition in the sale of anthracite to the public. All these companies have contracts with independent producers and under them take for sale in a common market coal mined in one or more of the regions; and each *must* buy some coal thereunder, if it sells any to the public.

The purchase price payable to the independents in any one region is based on the average obtained by all the railroad coal companies for coal there-

from sold at tidewater; a reduction of its selling price by only one company would reduce the common purchase price but a fraction of that amount; and each company can determine just how much coal it will accept. If, therefore, one of them should sell to the public at a price materially below that maintained by the others it would thereby decrease the amount the latter would be required to pay independents, with the result of increasing their profits, entailing a serious loss on itself, and at the same time probably creating discontent among independents, accompanied by an agitation against existing transportation rates.

Since all the railroad coal companies *must* buy some independent coal, if they sell any, at a uniform price, and since by cutting the selling price to the public any one would thereby increase the profits of natural competitors while extinguishing its own, the inevitable tendency is to prevent fair competition amongst them in the sale of coal.

(3) The 65 per cent contracts also destroy competition in sales between the independent operators parties thereto and the railroad coal companies; and this for the life of the independent mines. If it be against public policy for producers to be deprived for a limited time of competition amongst dealers to whom they sell, so much the more must it be so for the general public to be deprived for all time of the benefits of competition amongst dealers from whom they buy.

Referring to a combination which, like this, served the double purpose of maintaining uniform rates for its own members and eliminating the competition

of others, the Circuit Court of Appeals of the Second Circuit in a recent case said (*Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed., 251, 253):

> If there be any exception to the rule that the purpose of the statute [the Anti-Trust Act] is to preserve competition, it will not be found in a combination of carriers, which not only eliminates competition among themselves, but attempts in the manner shown in this record to prevent outside competition.

(4) Again, through the provision "shipments to be made from time to time as called for by the buyer," the latter "to take the coal in as nearly equal daily or weekly quantities as in its judgment the requirements of the market will permit," these contracts restrict the output of the independent operator at the will of the railroad or its coal company.

The independent must thus sell exclusively to the railroad coal company, and can mine only what the latter will take.

As stated by Judge Lanning (1 R., 462):

> Not only have the buyers the right under these contracts to all the coal that the sellers' collieries shall ever produce, but they alone are the judges of the requirements of the market, they alone determine when calls for deliveries by the sellers shall be made, and they alone determine what shall be the sellers' "just proportion of all the anthracite coal which the requirements of the market may from time to time demand." Here is something more than mere acquisition of property.

And by Judge Buffington (1 R., 439):

> The owner [had] no power to mine except as the buyer required.

The witness Howe, whose firm, A. Pardee & Company, have a 65 per cent contract with The Lehigh Valley Coal Company, described the operation of the restrictive provision (Howe, 2 R., 225, 231):

> Q. Have there been difficulties, for instance, in getting cars to your collieries at all times, or has it been only at exceptional times when these difficulties about getting cars have occurred?—A. We have not had difficulties lately, because the company is not obligated to take every pound of coal that we can get out. We get out what they want to take, and they supply us cars accordingly. They may say there will be a restriction, and they restrict us.

Yet more illuminating is the testimony of the president of the Lehigh Valley companies. Having stated that at the time he was testifying the collieries of The Lehigh Valley Coal Company in the lower field were running only half time, and that therefore the collieries of independent operators in that field having 65 per cent contracts with that company were also running *only half time*, since under such contracts an independent operator can only mine in proportion with his vendee, the railroad coal company (Thomas, 5 R., 1110), he further testified that independent operators in the same field who, having no 65 per cent contracts, shipped their coal to market, *were working full time* (Thomas, 5 R., 1110, 1111):

> Q. So the result of it is, then, at the present time, your mines in the lower region are shut down half the time?—A. About that; yes.
>
> Q. Does that apply to the mines of the parties from whom you take coal under the 65 per cent contracts?—A. They can only, under their contracts, run as our own mines run.

* * * * *

> Q. In this lower region where you operate are there any independent operators who ship their coals over the rails of the Lehigh Valley?—A. There are, and they are running full time.
>
> * * * * *
>
> Q. You think they are running full time?—A. I know they are. They are probably selling their coal at a cut rate. I do not know. I can not afford to.

(5) Again, by binding the output from the independent mines to the respective defendant railroad coal companies in perpetuity, competition for the transportation of such tonnage amongst existing railroads or between them and any new railroad is permanently foreclosed, as each will control the transportation of the coal of its subsidiary.

As observed by Judge Buffington (1 R., 439):

> It further appears that where similar contracts had been limited to seven years as they usually had been up to that time, they had not precluded competition. Indeed, the expiration of such seven-year contracts had made possible the projection of two carrier roads, and the testimony shows that the perpetuity clause was insisted on and inserted in the contracts thereafter by the combined action of the defendant railroads and their coal companies in order to withdraw from competition for all time the freights of these producers.

It is no answer to say that as a rule a mine is located only on the one road whose coal company purchased the output. For if the tonnage were free it might be delivered at points of connection between the initial line and one of the other roads for the long

haul, or one of the other roads might build its own lateral tracks to the mine. For example, before competition was killed, the Philadelphia & Reading Railroad built a lateral line to the mines of Coxe Brothers & Company and got the tonnage away from the Lehigh Valley Railroad, only to lose it again later. (2 R., 565; Baird, 5 R., 780.)

(6) Still again, the 65 per cent contracts chain one of the main forces (weak at best in the anthracite industry) by which freight rates are held to a reasonable level—the independent shipper distinct in ownership from the railroad. The present rates on anthracite are highly profitable (The Facts Established, *supra*, pp. 137–144), and, of course, are a most important factor in its present high cost. Since the bulk of the shipments are by the railroad coal companies, to which, from their relations with the railroads, it is a matter of indifference whether the tolls are high or low, there are at best but comparatively few shippers to work for lower rates. Through the 65 per cent contracts half of these, in quantity of output, have been silenced.

Conditions existing in the trade when they were formulated indicate that the very object defendant railroads had in view in insisting that the contracts run for the life of the mines was to silence forever the only class directly interested in securing a reduction in freight rates on anthracite, and by engrossing all the tonnage in sight, to close permanently the door against any new railroad. A stubborn contest for lower rates was at that time being fought by independent operators, a feature of which was the promotion by powerful interests of the Delaware Valley & Kingston Railroad from the coal fields to tidewater.

(7) Thus far in the consideration of the 65 per cent contracts the union in ownership and management of the vendee coal companies with the carriers, set forth earlier (*supra*, pp. 34–47), has not been taken into account. That relation imparts a further element of illegality more pernicious than any yet alluded to.

The charge of the petition in this regard is that—

> the defendant carriers * * * fixed the said percentages to be paid by them or their coal companies under said contracts at a point that bore such a relation to the published rates of transportation, that * * * the independent operator who entered into one of these contracts realized upon his coal from 15 to 50 cents more a ton, approximately * * * than was realized by the independent operator who shipped his coal to tidewater on his own account * * * which difference or advantage represents the amount per ton that the defendant carriers or their coal companies paid for the privilege of controlling the sale and disposition of the independent output so as to prevent it from selling in competition with the output of their own mines, as aforesaid. (1 R., 18, 19.)

The independent operators on each road make these contracts with the coal company affiliated with that road, and of course the coal is shipped over it. In one instance the same corporation, The Delaware, Lackawanna & Western Railroad Company, is railroad and coal company both.

Further, it is a condition of the trade that a producer or dealer cannot rely for the disposition of his coal solely upon the markets at intermediate points between the mines and tidewater—line points as they are called—but must ship largely to the great distrib-

uting market at New York Harbor. (Fuller, 2 R., 483.) A large part of the coal purchased under these contracts must, therefore, be shipped there for resale. In 1907 the amount was 3,342,933 gross tons. (The Facts Established, *supra*, p. 70.)

It has been arithmetically shown, with respect to the coal so purchased and sold at New York Harbor, that after paying the purchase price of the various sizes and the minimum expense of marketing, the portion of the selling price remaining has fallen materially short of the published freight rates on all sizes in all months during the earlier years of the period, and at the present time on some of the sizes in all months and on the principal sizes in some months, the higher prices charged the public in recent years making it possible for the railroad coal company to realize sufficient to pay the freight on some sizes in some months. (The Facts Established, *supra*, pp. 71–73.)

In November, 1900, the first month of the contracts, the shortages of the Lehigh Valley (a typical case) were as follows: On grate or broken, 69 cents per ton; on egg, 63 cents; on stove, 18 cents; on chestnut, 16 cents; on pea, 36 cents; on buckwheat No. 1, 33 cents; on buckwheat No. 2, 27 cents. (Table III, Appendix A.) This means that the independent operator making one of the 65 per cent contracts would realize just those amounts more than if he had shipped his coal to market himself. See the tables (Appendix A), where the results are worked out for each company as to each size and for each month of the year.

Now, in *Interstate Commerce Commission* v. *Chesapeake & Ohio Railway Company* (200 U. S., 361), this Court decided that when a railroad, assuming the dual rôle of dealer and carrier, buys goods and

ships them to market over its own line and sells them for a price which does not leave sufficient to pay the published freight rate of the railroad after the original cost of the goods and expense of marketing have been taken out, it is in effect transporting those goods at less than published rates.

Can it prevent the application of this principle that the purchaser of the coal is not in name the railroad, but a coal company whose every share is owned by the railroad, whose executive officers are those of the railroad, whose oneness with the railroad is so absolute indeed that the latter has appropriated to it for working capital millions of dollars without security or interest? (The Facts Established, *supra*, pp. 34–44.)

Is it conceivable that the decision of this Court in the *Chesapeake & Ohio case* would have been different if there, instead of the railroad buying, shipping, and selling, those things had been done by a company owned by the railroad and managed by its officers?

To these questions there is but one answer unless form be made everything, substance nothing. For whether the purchaser be the railroad or the coal company whose stock it owns, the deficiency below the published rate comes out of the former's treasury, and this Court has laid that down as the test. Thus, in the *Chesapeake & Ohio case*, it said (p. 389):

> Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake and Ohio *bore the loss* arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery. [Italics ours.]

And in *Interstate Commerce Commission* v. *Baird* (194 U. S., 25), analyzing these 65 per cent contracts to decide the question of their relevancy as evidence on the very issue now presented—whether the railroads whose coal companies had made them were not thereby departing from their published rates—it likewise said (pp. 43, 44):

> These contracts were made by the officials of the railroad companies, who were also officials of the coal companies, after protracted conferences.
>
> * * * * *
>
> If the railroad companies in fact received their compensation for carriage from the sum retained by the coal companies, as was claimed, then whether they realized more or less than their published rates depended upon the price of coal. Taking the prices at times as shown in the statements filed with the commission, it is apparent that the 35 per cent was less than published rates, and if that was the sum received for transportation, would work a discrimination against coal companies not having such contracts and paying the full rate. On the other hand, if the coal companies paid the full rate, and failed to realize as much from the percentage of the selling price retained, they would be losing money, and as they were owned by the railroad companies the loss would be ultimately theirs and not the coal companies.

In the instant case Judge Buffington found (1 R., 426, 427):

> The substantial identity of the several defendant railroads and their respective subsidiary coal companies is shown in the proofs.

To the same effect are the cases of *Interstate Commerce Commission* v. *Baird* (123 Fed., 969, 971); *Lehigh Valley R. Co.* v. *Rainey* (112 Fed. 487); *Meeker & Co.* v. *Lehigh Valley R. Co.* (decided by Interst. Com. Com. June 8, 1911); *Stockton, Attorney General,* v. *Central R. R. of N. J. et al.* (50 N. J. Eq., 52, 489); *Farmers' L. & T. Co.* v. *New York, &c., R. Co.* (150 N. Y., 410, 424); *Buie* v. *C., R. I. & P. Ry.* (95 Tex., 51); *Union Traction Co.* v. *Chicago* (199 Ill., 579, 626); *Columbus, Hocking Valley & Toledo R. R.* v. *Burke et al.* (20 Weekly Law Bul., Ohio, 287).

The Philadelphia & Reading Railroad has itself admitted that contracts of this description fix the freight rate. Referring in its annual report for 1895 to a contract by its subsidiary to purchase coal from The Lehigh & Wilkes-Barre Coal Company for 60 per cent of the tidewater price (Govt. Ex. No. 142), it stated (2 R., 566):

> The tidewater price of coal being largely made up of the two factors, the price at the mines and the charge for transportation thence to tide, this agreement necessarily made the freight rate also a percentage of the price realized for the coal at tidewater, * * *.

Mr. Walter, a former president of the Lehigh Valley, has also testified that the 65 per cent contracts fix the freight rate (3 R., 376):

> Mr. SHEARN. In other words, you recognize, and have recognized all along, that these 65 per cent contracts were really contracts to fix the rate?
>
> Mr. WALTER. Substantially.

Again, the direct relation between such contracts and freight rates is brought out with great force by

the Interstate Commerce Commission in *Meeker & Co.* v. *Lehigh Valley R. Co.*, decided June 8, 1911.

We therefore conclude that if a railroad, in buying goods and transporting them to market over its own line and selling them for a price which does not leave the full published rate after taking out the cost and expense of marketing, is in effect transporting the goods for less than the published rate, the result can not be different where, instead of the railroad itself buying, shipping, and selling, a subsidiary company, owned and controlled entirely by it, does so. (*United States* v. *Lehigh Valley R. Co.*, 220 U. S., 257.)

Perhaps it will be contended by defendants that in their special cases this practice is saved from illegality by the rulings of the Interstate Commerce Commission in *Haddock* v. *Delaware, Lackawanna & Western Railroad* (4 I. C. C. Rep., 296), and in *Coxe Bros. & Company* v. *Lehigh Valley Railroad* (4 I. C. C. Rep., 535), decided respectively in 1890 and 1891, which this Court in the *Chesapeake & Ohio case* conceded to be binding now, *under precisely the same conditions.*

What was the interpretation given to the Act to Regulate Commerce in those cases? That it was no violation thereof for a railroad in the position either of the Delaware, Lackawanna & Western or the Lehigh Valley to buy merchandise, transport it to market over its own line, and sell it for a price not sufficient to pay its published rate after taking out the original cost of the merchandise and the expense of marketing? Not at all. The Commission in those cases denounced that identical practice as a violation of the Act. Chairman Morrison,

delivering a unanimous opinion in the *Coxe case*, said (4 I. C. C. Rep., 571):

> Should a railroad company, to secure freight, or for any other purpose, purchase coal at the anthracite mines, carry it to market and sell it at such a price that, after deducting the price paid and the expense of selling, would leave the road, as a purchaser, less than would pay its transportation charges, the result or effect of the transaction would be that the road had given itself a lower rate as a dealer than it gave to other dealers and shippers. The road would be thus giving itself undue preference, and the legal effect must be the same whether this is done directly by the road in its own name, or indirectly in the name of another corporation, of which this railroad company is proprietor.

While thus declaring the practice unlawful, the Commission, for reasons that have lost force with the fuller control now exercised over corporations, conceded that by reason of the powers to produce and to vend having become associated with the power to transport through the ownership of the stock of The Lehigh Valley Coal Company by the Railroad, obstacles were created which made the operation of *its* remedial process "impracticable." This Court was careful to describe the conclusion reached by the Commission as referring "to the *character of relief* which could be afforded." (200 U. S., 400.)

It is therefore evident that the interpretation in the *Haddock* and *Coxe cases*, accepted by this Court in the *Chesapeake & Ohio case*, went no further than to hold that, when committed by railroads in the position of

the Delaware, Lackawanna & Western and the Lehigh Valley, no remedy which the Interstate Commerce Commission could administer could be invoked against the practice in question. On the other hand, it settles that the practice *is* unlawful, and necessarily punishable under the criminal provisions of the Act and subject to any other form of redress which the *courts* may afford.

In any event, moreover, it was only as restricted to the case of a carrier exercising the combined powers of *producing*, transporting, and selling, as contradistinguished from *buying*, transporting, and selling, that this Court in the *Chesapeake & Ohio case* allowed the Commission's acknowledgment of *its* lack of power to deal with the resulting discrimination to stand as an authoritative interpretation of the law. (200 U. S., 400.) In either case, to determine whether the railroad had enough left to pay its published tariff, it is essential to know the original cost. And it might well have been that where the railroad *produces* the coal which it transports and sells, the Court, realizing the difficulty of ascertaining the cost of mining, was willing to accept the Commission's conclusion that it was "impracticable" for *it* to deal with the situation, whereas it would have pronounced such a conclusion "plainly erroneous" where the railroad *buys* the coal, as there the original cost is easily determined.

Finally, neither the Lehigh Valley nor any other defendant railroad except the Delaware, Lackawanna & Western, posesses the power to produce as well as transport—"the controlling consideration in the decisions made in the Haddock and Coxe Brothers cases." (200 U. S., 402.) [In the latter it

seems to have been supposed that the Lehigh Valley has such power, but it admits that it has not. (1 R., 63).]

Assuming as established that the 65 per cent contracts, being part of a course of dealing whereby coal is transported to New York Harbor for less than the published rates, are violative of the Act to Regulate Commerce, the question remains whether, also, they do not in that aspect, no less than in those beforementioned, violate the Act of July 2, 1890, by creating or directly tending to create monopolies.

Here is a railroad company owning a coal company which makes contracts with independent operators for the purchase of their coal at the mines. A large part of this coal must be marketed at tidewater, New York Harbor, the great distributing point, and is carried there by the railroad which owns the vendee coal company. (The Facts Established, *supra*, p. 70.)

The price at the mines which the coal company offers is more than it can realize from the sale of the coal at tidewater after taking out the freight at published rates and the minimum expense of marketing. It is able to offer this price and sustain the consequent loss because of its union in ownership with the railroad. Obviously, no other dealer, at least no other dealer in the tidewater market, can offer any such price and live, and therefore the result must be a monopoly for the railroad, or its coal company, of the coal produced along its line.

Thus, on none of the defendant railroads are shipments of anthracite by its own coal department or subsidiary company less than 77 per cent of the

whole. The next lowest is 84 per cent; and on up to 96 per cent. (The Facts Established, *supra*, p. 48.)

Referring to an identical course of dealing in the *Chesapeake & Ohio case* (*supra*) this Court, in language prophetic, said (200 U. S., 392):

> * * * the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an *absolute monopoly*. [Italics ours.]

And in *Swift & Company* v. *United States* (*supra*) it was held (p. 402):

> It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

It is thus clear that the 65 per cent contracts, as part of a course of dealing by which coal is transported at less than the lawful rates, are direct and powerful instruments for monopolizing trade.

Similar contracts have been held unlawful at common law, because in restraint of trade, by courts of high authority.

In *Stockton, Attorney-General,* v. *Central R. R. of N. J. et al.* (50 N. J. Eq., 489), a contract of the same type dealing with the same commodity was declared illegal, the Court saying (p. 498):

> It participated in the scheme of the railroad companies to lessen and destroy competition and increase the price of coal, in that it made provision for a share in the profits of the

execution of that scheme by fixing a percentage of the proceeds of sale as the price to be paid from time to time for its output [just as in the contracts of the present case the price paid the seller is a fixed percentage of the average price realized at tidewater], and in that it insured enhanced prices, by reserving the right to suspend deliveries if, at any time, the prices realized should not pay reasonable royalties and the cost of mining [just as under the present contracts the seller may suspend deliveries should the average tidewater price drop below a certain figure], and in that it submitted to a restriction of the output of the Lehigh & Wilkes-Barre Company, so that it should correspond with the output from the collieries of the vendee, thus enabling the latter to control the market supply [just as the present contracts enable the vendees, the railroad coal companies, to control the market supply by means of the provision, "shipments to be made from time to time as called for by the buyer"].

In the leading case of *Attorney General* v. *Great Northern Railway Company* (6 Juris., N. S., 1006), a scheme to control the sale of coal identical in its material provisions with the 65 per cent contracts, though less far-reaching, was held illegal. There the Great Northern Railway, which transported coal from mines in the north of England to London and intermediate points, and the owners and operators of such mines, entered into contracts under which the coal owners disposed of their coal to the railway, whose agent sold it and turned over to the coal owners a certain percentage of the proceeds. An injunction to restrain the carrying out of the contracts was asked on the grounds (1) "that all such conduct was *ultra*

vires of the company" being unauthorized by its charter, and (2) "that it tended to create a monopoly in the market for sales [of coal]."

The Vice Chancellor sustained both grounds. That part of his judgment dealing with monopolizing might have been delivered in the present case. We quote a short passage (pp. 1008, 1010):

> Here we have this company having the traffic from the north of England, where the great coal fields are, at least some of the principal coal fields, supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may—I will not say has—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic, that is, the dealing in all the coal in the large districts supplying coal to the country. * * * If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line?

Here we have not only the counterpart of the Great Northern Railway's case but as well the realization of the Vice Chancellor's suppositious case, that—

> What this company is doing may just as well be done by each of the other companies * * * and the result would be, in effect, not a monopoly of one company, but a monopoly of three or four or five companies, and a monopoly most prejudicial (p. 1009).

In *Arnot* v. *Pittston & Elmira Coal Co.* (68 N. Y., 558), there was a plan to control the market for

anthracite in Western New York also closely resembling, on a reduced scale, the 65 per cent contracts. There, the defendant, which had a coal depot at Elmira, and operated anthracite mines near Pittston, made a contract with plaintiff's assignor, Butler Colliery Company, which likewise operated mines near Pittston, in which the defendant company agreed to take all the coal that the Butler Company should ship north of the Pennsylvania State line, not exceeding 2,000 tons a month, at the regular market price less a certain commission, and the Butler Company agreed that it would not sell coal to go north of the Pennsylvania line to any one other than the defendant. The output of the mines of the Butler Company largely exceeded 2,000 tons a month. The defendant made contracts to the same effect with other mine operators at Pittston, which at that time was connected with Elmira by a canal.

The Court held that the contract between the defendant and the Butler Company—the particular one of the series in suit—illegally restrained trade, saying (p. 566):

> No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited.

It may be said that there the vice in the contract was that it kept the output of the Butler Company in excess of 2,000 tons a month out of the Elmira market, whereas the contracts here provide for the sale of *all* the coal mined by the vendor operators. But this difference is not real, as the contracts here, while binding the independent operators to sell all the coal they mine to the railroad coal companies,

contain the further provisions that shipments are "to be made from time to time *as called for by the buyer,*" and that the buyer is "to give, on the 25th of each month, notice of the quantity as nearly as practicable buyer will *require* for next month."

So far the 65 per cent contracts have been viewed collectively as parts of a plan, that clearly being their real character. But this is not a case of contracts innocent when separately considered and unlawful *only* as parts of a plan—where only the plan makes them bad. (*Shawnee Compress Co.* v. *Anderson*, 209 U. S., 423; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373.)

Each contract here is itself repugnant to the Act of Congress. As before shown, it is not a mere contract for the purchase of coal. It is more even (or less) than a contract to purchase the total output of a mine. It does not bind the vendee railroad coal company to take all the mine can produce, nor any definite amount. How much it will take rests with it. At a price that would yield a moderate profit a ready market might be found for all the mine can produce, yet the railroad coal company is not bound to take any more than it can resell at the price it chooses to demand. On the other hand, the independent operator is prohibited from selling to anyone else. If the railroad coal company will not take all he can or wishes to produce he must shut down. His mine is thus completely under the control of the railroad coal company. Indeed, it will be recalled that President Thomas of the Lehigh Valley Railroad and Coal Companies testified that independent oper-

ators who have such contracts "can only, under their contracts, run as our own mines run." (5 R., 1110.)

Here, then, is a contract between a trader and a stranger which restricts with a vengeance his freedom in the conduct of his business as long as it shall last. It therefore belongs to the class of contracts described by this Court in the *Standard Oil Company's case* as "in restraint of trade in the *subjective* sense"—contracts by which one "voluntarily and unreasonably restrains his right to carry on his trade or business." (221 U. S., 56, 59.)

Likewise, it falls within Mr. Justice Holmes's strict definition of contracts in restraint of trade:

> They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Co.* v. *United States*, 193 U. S., 197, 404.)

Again, as before shown (*supra*, pp. 222–229), coal delivered to the subsidiary company of the railroad under one of these contracts has an advantage in the cost of transportation to tidewater. Naturally, therefore, the independent operators are drawn into them, with the result that the railroad controls the trade in coal produced along its line. Such a contract is therefore bad as a means of monopolizing. It was held in *Swift & Co.* v. *United States* (196 U. S., 375, 402)—

> that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

For a fuller demonstration of this conclusion we refer to the discussion on pages 222–231 above.

SECOND. Taking it as established that the 65 per cent contracts restrain and monopolize trade in anthracite, we come to the question whether the trade so affected is interstate.

Contracts may directly affect interstate commerce and hence be within the power of Congress to regulate, though not transactions of interstate commerce.

The power to regulate interstate commerce is the power "to prescribe the rules by which it is to be governed." (*Gibbons* v. *Ogden*, 9 Wh., 1, 196.) "This power * * * is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." (*Ibid.*; *Howard* v. *Illinois Central R. R.*, 207 U. S., 463.)

In its exercise Congress may prohibit any transaction or condition of things, *whether part of the body of interstate commerce or not*, which directly, and not merely incidentally or remotely, interferes with its duly prescribed rule for the conduct of such commerce. (*U. S.* v. *Coombs*, 12 Pet., 72; *Howard* v. *Illinois Central R. R.*, 207 U. S., 463; *Loewe* v. *Lawlor*, 208 U. S., 274; *West* v. *Kansas Natural Gas Co.*, 221 U. S., 229.) Otherwise, the power would be not complete, plenary, supreme, as the Constitution ordains, but vain and ineffective. To concede that Congress may prescribe a rule for interstate commerce and yet deny it the power to enforce that rule by prohibiting acts directly interfering with it when they take place within State lines, would be, in the language of Mr. Chief Justice White, "but to concede the power and then to deny it, or at all events to recognize the power and yet to render it

incomplete." (*Howard* v. *Illinois Central R. R., supra*, p. 495.)

The test, therefore, is not merely whether the thing prohibited is itself a part of interstate commerce, but whether in its direct consequences it nullifies or interferes with a rule prescribed by Congress for the regulation of such commerce. Congress may prohibit A and B from erecting a dam across a navigable river in violation of its rule of unobstructed interstate highways (*United States* v. *Rio Grande Dam & I. Co.*, 174 U. S., 690), yet the prohibited action is not a part of interstate commerce, nor need A and B have been engaged therein. So, if A and B have a contract alleged to violate the Congressional rule that competition in interstate commerce shall not be unduly restricted, the question is not whether that contract is a transaction of interstate commerce—a part of interstate commerce—but whether by its direct consequences it unduly restricts competition therein.

In *United States* v. *Coombs* (*supra*), it was held that Congress may punish thefts of goods from vessels stranded on the shores of a State *above* high water mark, because such thefts "tend essentially to obstruct, prevent, or destroy the due operations of commerce and navigation with foreign nations and among the several States." Mr. Justice Story, delivering the opinion of a unanimous Court, thus analyzed the power of Congress to regulate commerce (p. 78):

> It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts done on land which *interfere with, obstruct, or prevent the due exercise of the power to regulate*

commerce and navigation with foreign nations and among the States. [Italics ours.]

If Congress has jurisdiction of thefts within a State which essentially obstruct the due exercise of the power to regulate interstate or foreign commerce it must have jurisdiction over contracts made and performed within a State having the same effect.

In *Loewe* v. *Lawlor* (*supra*), the defendants were members of a labor union prosecuting a boycott against a manufacturer of hats in Connecticut. They were not engaged in interstate commerce; their acts were not transactions of interstate commerce. It was enough that interstate commerce was affected by what they did; that the sale of plaintiff's hats in other States was obstructed.

So in *Gibbs* v. *McNeely* (118 Fed., 120), a combination of manufacturers of and dealers in red cedar shingles *in the State of Washington* to control the production and price thereof, which were manufactured *only in that State*, although the agreement made no provision with respect to the transaction of business across State lines, was held by the Circuit Court of Appeals of the Ninth Circuit to bear directly upon interstate commerce, since the shingles were principally sold in other States.

Again, in *Howard* v. *Illinois Central R. R.* (*supra*), answering the contention that an employers' liability act was beyond the power of Congress because, being a "regulation of the relations of the employer to those whom he employs, and the relation of those employed by him among themselves, it deals with subjects which cannot, under any circumstances, come within the power conferred upon Congress to

regulate commerce," the Court, speaking through Mr. Justice White, said (pp. 494, 495):

> *But we may not test the power of Congress to regulate commerce solely by abstractly considering the particular subject to which a regulation relates,* irrespective of whether the regulation in question is one of interstate commerce. On the contrary, *the test of power is not merely the matter regulated,* but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. [Italics ours.]

In *West* v. *Kansas Natural Gas Co.* (*supra*), it was held that a law of a State regulating the use of its own highways by pipe lines in a way to restrain or obstruct the free movement into the channels of interstate commerce of natural gas produced within the State, directly affects interstate commerce. For greater reason, then, must this be so of a contract between individuals, though made and performed within a State, which restrains or obstructs the free movement and barter in interstate commerce of an article produced within the State.

The power to regulate commerce thus necessarily embraces not only transactions constituting part of the body of such commerce, including therein its instrumentalities—for example, navigation, transportation, vessels, cars, locomotives, the telegraph—but also things not part thereof which obstruct or otherwise directly affect it.

Where the subject matter regulated is itself a part of interstate commerce the jurisdiction of the Federal Government is conceded, and the only question

is whether Congress has observed the Constitutional limitations in legislating upon a subject matter admittedly belonging to it and not to the States.

Where, however, in prescribing a rule for the conduct of interstate commerce, the Act of Congress reaches outside the body of commerce to prohibit a condition of things which would interfere with or subvert its rule, the further question arises, whether it is within the jurisdiction of the Federal Government to legislate with respect to that condition of things at all; that is, whether what is prohibited is directly related to the regulation of interstate commerce; whether, as the proximate, efficient cause, it interferes with or obstructs the due exercise of the power.

Of course, not every matter relating to interstate commerce or the regulation thereof is subject to the control of Congress. If it were, but little would be left to the States. The relation must be direct, not merely incidental or remote. Whether such direct relation exists is a practical question to be determined upon the facts of each case. This Court has thus said (*Hall* v. *De Cuir*, 95 U. S., 485, 488):

> Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

In determining whether a particular condition of things so directly interferes with a rule of Congress for the conduct of interstate commerce as to be within Federal control, some help may be derived from the doctrine of proximate cause in the law of torts. When an injury is the natural and probable

consequence of an act, and there is no other separate, intervening, efficient cause, that act is the proximate cause of the injury. (*Milwaukee, etc., R. R.* v. *Kellogg*, 94 U. S., 469.) So, if a particular act or condition of things, with no independent efficient cause intervening, produces as its natural and probable consequence an interference with a rule prescribed by Congress for the conduct of interstate commerce, that act or condition of things, whether itself a part of the body of such commerce or not, constitutes a direct interference.

This reasoning involves no assertion of Federal power to regulate or control generally production or other transactions within a State. It leaves those subjects where they have always been and must remain—with the State governments. (*Kidd* v. *Pearson*, 128 U. S., 1.) It only asserts the power of Congress to debar those engaged in production or other activities within State lines from acts the direct and necessary consequences of which would be to nullify rules admittedly within the power of Congress to prescribe. And this is but to say that the power of Congress to regulate commerce is real, supreme. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere and so to modify every power vested in subordinate governments as to exempt its own operations from their influence." (*McCullough* v. *Maryland*, 4 Wh., 408, 427.)

Nor does it follow because Congress may prohibit contracts, monopolies of production, and other transactions within State lines which interfere with its rule, that the States may not also, under their power of police, forbid such transactions within their

respective borders. As observed by Chief Justice Marshall in *Gibbons* v. *Ogden* (9 Wheat., 1, 204):

> If a State in passing laws on subjects acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.

It follows that to bring them within the Act of Congress these 65 per cent contracts need not themselves be transactions of interstate commerce, though it seems now clearly established that with the accompanying transportation and sale in other States of the purchased coal, as a constantly recurring course, they form a current of such commerce. (*Swift & Co.* v. *United States*, 196 U. S., 375, 398, 399.) It would be enough if, though themselves intrastate transactions, they yet directly affect interstate commerce or a regulation thereof by Congress.

It is true that they profess to be for the sale of coal at the mines in Pennsylvania, and that most, if not all, of the buyers and sellers are citizens of that State, most of them corporations.

On the other hand they expressly contemplate and are made with direct reference to interstate as well as intrastate commerce. Thus, since the railroad coal company agrees to take from the independent operator only as much coal as it can find a market

for—that is, resell at prices which it deems advantageous—and since the operator is forbidden to sell to anyone else, it was necessary for the latter's protection that the railroad coal company covenant to find a market for as much of his coal as possible (see contract, 1 R., 30), which means of course to find a market not in Pennsylvania alone, but wherever there is a demand to be supplied; and that is done in carrying out the contracts.

By their very terms, therefore, as well as by their operation, these contracts relate to interstate commerce. It was so held of a similar contract by the Circuit Court of Appeals for the Sixth Circuit, whose membership at the time included two justices now sitting in this Court. (*Chesapeake & Ohio Fuel Co.* v. *U. S.*, 115 Fed., 610, 624.)

The buyers, moreover, are all engaged in trade and commerce among the States. (Ruley, 5 R., 992, 993.) So, also, were at least some of the sellers when they began selling to the railroad coal companies. (Howe, 2 R., 211; Simpson, 2 R., 439; Fuller, 2 R., 471.) And the coal purchased is not segregated and kept in Pennsylvania, but a large part is habitually shipped by the buyers to other States and there sold by them as a constantly recurring course, 3,342,933 gross tons having been shipped to New York Harbor alone in 1907. (Govt. Exs. Nos. 36, 50, 63, 74, 89, 92; 3 R., 112, 126, 142, 158, 178, 182.)

Through such contracts, furthermore, the buyers shut out competition amongst themselves in the purchase of a substantial portion of the coal which they distribute in the channels of interstate commerce, and also prevent competition amongst themselves as sellers.

Through them, also, the buyers regulate the quantity of coal produced by the sellers which shall be shipped to markets outside as well as within Pennsylvania, and prevent the same being sold in such markets in competition with their own.

And lastly, through such contracts the coal purchased is transported in interstate commerce at less than the published rates, with the result of creating or directly tending to create a monopoly for the buyers.

Does not a contract by one to find markets throughout the States for another's product relate to interstate commerce?

Does not a contract relate to interstate commerce when it is one of an identical series by which the principal dealers in a commodity shut out all competition in the purchase of a substantial part of their supply, which they ship and sell in the channels of interstate commerce, and likewise prevent competition amongst themselves as sellers?

Does not a contract under which a stranger to the business regulates the amount of coal which shall be shipped from a mine to interstate markets relate to interstate commerce?

Does not a contract relate to interstate commerce when it is one of an identical series by which a group of dealers all engaged in interstate commerce prevent the output of others from being sold in interstate markets in competition with their own?

Does not a contract through the operation of which a commodity is transported in interstate commerce at less than the published rates relate to interstate commerce?

There can be no question that in their whole effect as above set forth the 65 per cent contracts affect directly and vitally interstate commerce in anthracite. And it is as a whole that they must be considered.

In *Montague* v. *Lowry* (193 U. S., 38), where wholesale dealers in tile in San Francisco and manufacturers of tile in other States had formed an association in which the dealers agreed not to purchase from manufacturers not members and the manufacturers agreed not to sell to dealers not members, and in which further the dealers agreed not to sell unset tile to outsiders for less than list prices, which were 50 per cent higher than those to members, it was contended by the defendants—

> that the transactions in unset tile at list prices * * * are local transactions, intrastate transactions, in no respect taking on the quality of interstate commerce.

The Court's answer exactly fits the case here (p. 46):

> The whole thing is so bound together that when looked at as a whole the sale of unset tile ceases to be a mere transaction in the State of California, and becomes part of a purpose, which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Another analogous case is *Dozier* v. *Alabama* (218 U. S., 124), where plaintiff in error was convicted in Alabama of selling picture frames without paying the prescribed license tax. As the agent of a Chicago crayon company, which likewise had not paid the tax, he delivered to a customer in Alabama a picture *and frame*, and collected the price.

The delivery was pursuant to a contract between the Chicago company and its Alabama customer for the picture *only*, it being stated, however, in the writing constituting the contract that the picture would be delivered in a frame, which the customer might take at the factory price or return, as he chose. The defense was that the entire transaction was one of interstate commerce, and therefore could not be taxed by the State; but the Supreme Court of Alabama, while admitting that the dealings concerning the picture were commerce among the States, sustained the conviction on the ground that the sale of the frame was a wholly local transaction. (154 Ala., 83.)

This Court held, however, that although "it took place wholly within the State of Alabama" (218 U. S., 128), the sale of the frame was so related to the sale of the picture, admittedly a transaction of interstate commerce, as to be within the protection of the commerce clause, and that in consequence a tax upon it was void as a burden on interstate commerce. Mr. Justice Holmes, delivering the opinion, referred to the declaration in *Rearick* v. *Pennsylvania* (203 U. S., 507, 512), that "commerce among the States is a practical conception, not drawn from the 'witty diversities' of the law of sales," and added this further statement of the principle (p. 128):

> What is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.* (220 U. S., 373) it was said of the contracts involved (p. 400):

> That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country," and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear.

But after all, the relation of the 65 per cent contracts to interstate commerce is not, we submit, a debatable question here, having been determined by this Court in *Interstate Commerce Commission* v. *Baird* (*supra*).

There the Circuit Court had denied an application of the Commission to compel the production before it of these same contracts on the hearing of a complaint against the anthracite roads under the Act to Regulate Commerce, basing its refusal

> upon the ground that they related solely to an *intrastate* transaction—the sale of the coal in Pennsylvania—and had nothing to do with interstate commerce. (194 U. S., 41.)

This Court reversed that decision and ordered the contracts to be produced, saying (p. 42):

> Why may not the Interstate Commerce Commission, under the powers conferred, and under this complaint, inquire into the manner in which this business is done? It has the right to know how interstate traffic is conducted, the relations between the carrier and its shippers, and the rates charged and collected. We see no reason why contracts of this character, which have direct relation to a large amount of its carry-

> ing trade, can be withheld from examination as evidence by the commission.

Their production before the Commission could not have been compelled unless they related to interstate commerce. (*Harriman* v. *Interstate Commerce Commission*, 211 U. S., 407, 419.)

On this feature Judge Buffington held (1 R., 439):

> The proofs before us show, and the Supreme Court in *Interstate Commerce Commission* v. *Baird* (194 U. S., 42) held, that these contracts involved interstate commerce.

They affect interstate commerce none the less because they may also embrace commerce solely within Pennsylvania. (*Swift & Co.* v. *United States*, 196 U. S., 375; *Loewe* v. *Lawlor*, 208 U. S., 274; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373, 400; *Pennsylvania Sugar Refining Co.* v. *American Sugar Refining Co.*, 166 Fed., 254.)

THIRD. The grounds on which the 65 per cent contracts are defended.

(1) The first—that they are contracts between citizens of Pennsylvania there made and performed and hence have no direct relation to interstate commerce—has just been answered. (*Supra*, pp. 237–249.)

(2) It is said, presumably to show absence of wrong intent, that almost from the beginning it has been the practice of the railroad coal companies to purchase the output of independent operators for a percentage of the tidewater price, and that the 65 per cent contracts were but a continuation thereof. On this and the preceding ground Judge Gray practically rests the case for them. He says (1 R., 417):

> They were the result of the natural development of the business and the peculiar condi-

tions pertaining thereto in the coal region during a long series of years, and so far from being in restraint of commerce, contributed largely to its orderly and healthy growth.

There are several answers to this defence, each sufficient:

(*a*) If, as maintained, the "inherent nature and effect" of the contracts is to restrain trade among the States in anthracite within the meaning of the Act of Congress, that is enough. For it is settled that existing, continuing acts, otherwise within the prohibition of a lawful regulation of commerce by Congress, are not saved because their genesis and development antedated its enactment. (*Commodities Clause Case*, 213 U. S., 366; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S., 467, and cases there cited.)

(*b*) But the fact is, the 65 per cent contracts are not a continuation of the previously existing practice. They depart from it in vital particulars already sufficiently noticed. For example: They bind the product of the independent operator to the railroad coal company for the life of his mine instead of a short term, as before; they contain provisions which enable the railroad coal company to say what the output of the independent shall be; and the price and other terms were fixed by concert of action among the railroads and their coal companies, whereas previously the price had been determined by competition, one company or another raising the percentage from time to time, as, for instance, the New York, Susquehanna & Western in the early eighties (Sturges, 2 R., 281, 310), and the New York, Ontario & Western in 1888 or 1890

(Sturges, 2 R., 282, 283), and the others being compelled by laws of trade to follow.

(*c*) The practice of which the 65 per cent contracts are said to be a continuation was held unlawful many years ago (1891) by the Interstate Commerce Commission in *Coxe Bros. & Co.* v. *Lehigh Valley R. R.* (4 I. C. C. Rep., 535, 571), on the ground that it worked a departure from the railroad's published freight rates. Further, we have shown that since 1874 the Constitution of Pennsylvania has forbidden railroads either directly or indirectly through controlled companies to be dealers in coal transported over their lines. (*Supra*, pp. 145–159.)

As regards Judge Gray's statement that the "orderly and healthy" growth of the industry was promoted by the practice of railroad coal companies in so contracting to purchase the product of independent operators, it suffices to say that it is in conflict with the view of similar practices expressed by this Court in the *Chesapeake & Ohio case* (200 U. S., 361, 392), and by the Interstate Commerce Commission in *Coxe Bros. & Co.* v. *Lehigh Valley R. Co.* (4 I. C. C. Rep., 535, 571), quoted above (pp. 228, 231).

(3) The further claim is made, also, presumably to to show absence of wrongful intent, that the 65 per cent contracts originated in efforts to terminate the strike of mine workers in the early Fall of 1900. It is said that the miners having agreed to go back to work if their wages were advanced 10 per cent, the principal operators granted that advance "after a great deal of pressure and persuasion" from the chairman of the Republican national committee in the presi-

dential campaign then in progress, but that the independent operators stood out and the miners refused to resume work unless all employers granted the advance. Whereupon, the story continues, in response to "further pressure and importunity" from the same source, the principal operators agreed to make new purchase contracts increasing the prices paid the independents, who, assured of a higher price, granted the increase in wages, and the strike was over. (Ans., P. & R. C. & I. Co., 1 R., 98, 99.)

Obviously, the reference to political "pressure and persuasion" is an attempt to create a "moral" issue and thereby divert attention from the *legal* issue. Coming to the legal aspect of the contention the answer is:

(*a*) The independent operators voted to give their workmen the 10 per cent increase in wages at a meeting held October 5, 1900, not only *before* the new purchase contracts—the 65 per cent contracts—were offered to them, but *before* the committee which formulated and negotiated the same had even been appointed, and notwithstanding, also, that an earlier committee appointed "to confer with the presidents of the *transportation* companies and endeavor to learn if there is to be a reduction in the *rates of freight* to cover the advance in wages" had already stated at the meeting of October 5, 1900, that they "could not report a definite promise from them [the presidents of the transportation companies] that there would be a reduction in the freight rates," and could only report their "sympathy" and an "intimation" that "something would be done for the individual operators to improve the present conditions of the coal business." These facts appear from the min-

utes of the meeting of October 5, 1900, in evidence as Temple Iron Company Exhibit No. 7 (6 R., 30). For defendants to say, therefore, that the 65 per cent contracts were a sacrifice offering by them to obtain increased wages for the workmen of the independent operators and thereby end the strike, is to deny the written record produced by themselves; and Judge Gray in accepting their statement to that effect (1 R., 415) must have overlooked this piece of documentary evidence. The truth of the matter is, that when the principal producers—the railroad coal companies—granted the increased wages the independent operators were forced by laws of trade to follow suit whether offered any inducement to do so or not. (Howe, 2 R., 220; Cumming, 2 R., 375; Fuller, 2 R., 486; Opinion of Lanning, J., 1 R., 458.)

(*b*) Admitting for argument that defendant coal companies granted the increased wages under political pressure, and that they had to pay the independents higher prices before the latter would grant a like increase and thereby end the strike, and that they did that also under political pressure, and that so far their action was inspired by laudable motives and violated no law—it was not necessary to the end professed, it was not laudable, it was a breach of the Act of Congress, to go further and make use of the occasion to acquire control of the independent output forever at a uniform price, with the right at all times to regulate the quantity thereof. It is significant that the railroads or railroad coal companies not taking part in the conferences at which the 65 per cent contracts were framed—the Pennsylvania, the New York, Ontario & Western, the Delaware & Hudson, and Coxe Brothers & Com-

pany—did not demand that the new purchase contracts they made should run for the life of the mines. (Thomas, 5 R., 1099.) This circumstance is also further answer to Judge Gray's suggestion that "uniformity in the framework of these contracts would seem to be the natural result of the situation." (1 R., 418.)

(*c*) Had defendants really desired to improve the circumstances of the independents so that they might pay the higher wages and settle the strike, they should have reduced the freight rate, as asked, since that would have operated to the advantage of all independents alike. By the method adopted, only those who surrendered their free agency realized any more for their coal than before, and the advantage they received came through a departure by the railroads from their lawful rates. The following observation by Mr. Justice White in the *Chesapeake & Ohio case* is conspicuously apposite (200 U. S., 397):

> And it would seem that this means [the buying and selling of coal produced along its line by the railway company without reference to whether the net result to it would realize its published rates] of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, * * *. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake and Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake and Ohio as to what was best for itself and for the public.

(*d*) Finally, if the contracts are sufficient in themselves to produce a result which the Act of Congress seeks to prevent, as has been shown, then good intentions, if they existed, can not save them. (*Swift & Co.* v. *United States*, 196 U. S., 375, 396; *Northern Securities Company's Case*, 193 U. S., 197, 331; *Addystone Pipe & Steel Co.* v. *United States*, 175 U. S., 211, 234; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290, 341, 342; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed., 610, 623.)

(4) Another defense is that the contracts were made in good faith for the *purchase* of property and therefore with no ulterior purpose in view. We maintain, however, first, that the fact already shown—that at the time they were made a loss was incurred on every ton of coal purchased under them and shipped to the two leading markets for resale—strips them of any pretence of good faith as contracts merely for the purchase of coal. Again, the railroad coal companies do not undertake to purchase any definite quantity, but only so much as in *their* judgment the conditions of the market justify the seller in producing, thus showing that the contracts are devices to control the independent production. President Thomas, as noted above (p. 219), aptly illustrated their operation in this respect. But waiving these points, if we succeeded in showing that the contracts are sufficient in themselves to accomplish what the Act of Congress denounces, it does not save them that they are for the purchase of property. (*Harriman* v. *Northern Securities Co.*, 197 U. S., 244; *United States* v. *American Tobacco Co.*, 221 U. S., 106, 176.)

(5) It is also said, replying to the contention that defendant railroads are departing from their pub-

lished rates to New York Harbor in purchasing coal through their subsidiary companies under the 65 per cent contracts and transporting it to that market for resale at prices which do not leave enough to pay the freight after taking out the cost price and expenses of marketing, that in respect of the coal so purchased and transported to all points taken together, enough is realized to pay the total freight. The answer is that a railroad must observe its rates *to every point on every different size of coal;* that a shipper to any particular point is entitled to have his coal reach there on equal terms with all other coal transported by the same railroad.

(6) In further reply to the same contention it was said that defendants are under no expense in selling the coal purchased under these contracts, as they maintain an organization to market their own production, and marketing that purchased from independents adds nothing to their expense. Of course, however, the purchased coal must be charged with a proportionate part of the total expense of selling. Furthermore, the important thing is the expense of selling to independent operators rather than to the railroad coal companies. But allowing this naive contention, the freight rates would still not have been realized, as the tables show (Appendix A).

(7) It is said by Judge Gray that (1 R., 414)—

> The advantages of such sales to the independent and smaller operators were stated by many witnesses of that class. To have marketed their own coal would have required sales agents and the maintenance of offices at the various market points, and would have

> entailed the cost of insurance and the risk of collections, and not infrequently the cost of storage upon the seller.

Doubtless in some ways it is advantageous to producers of coal to dispose of their output to the subsidiary companies of the railroads. In the 65 per cent contracts one very important advantage was that the price offered at the mines was substantially more than the coal would have brought in the two principal markets after deducting freight. (The Facts Established, *supra* p. 72.) The railroad, of course, is only too willing to bestow such advantages in return for the monopoly of coal produced along its line.

If, however, such a course of dealing in coal is legally justified by the advantages accruing to the producer, then through a similar series of contracts with producers a railroad may without legal hindrance obtain a perpetual monopoly of all the produce along its line. The railroads of the South, by offering attractive terms, could obtain through subsidiary companies contracts with all the cotton growers for their entire production until the soil is exhausted, and with the right to regulate production. Those in the wheat-growing country could obtain a perpetual monopoly of the wheat produced; and so of corn and all other staples.

(8) Judge Gray also says (1 R., 418):

> Nor can we attribute to the so-called 65 per cent contracts an inherent illegality under the law, in the fact that they provide for the purchase by the coal companies of the whole product of the mine, whereas the percentage contracts prior to 1900 or 1902 were to con-

> tinue only for a term of years. *To buy the whole product of a mine is just as legitimate a transaction as to buy a portion of it.* [Italics ours.]

We do not stop to consider whether the theory of this argument is sound. Its application here rests upon the mistaken assumption that the 65 per cent contracts are mere contracts "to buy the whole product of a mine." In fact they are instruments by which the railroad coal companies regulate the output of their competitors, the independent operators—something very different from a contract "to buy the whole product of a mine." As Judge Lanning says (1 R., 462):

> Here is something more than mere acquisition of property. It is a plan for future acquisition of property and future regulation of the supplies to be furnished by the subsidiary coal companies and the selling companies.

And Judge Buffington (1 R., 439):

> Not only had the owner no power to mine except as the buyer required, but he had nothing to do with fixing the price which was determined by the general tidewater rate. Save in operation the mine was practically owned by the subsidiary coal company.

(9) As heretofore noticed, Judge Lanning, differing from his colleagues, held that the petition did not put in issue the legality of the 65 per cent contracts, but only whether they "were devised and are *maintained* by an unlawful combination" (1 R., 463); and finding them not so maintained he concurred in dismissing the charge without considering whether the contracts in themselves are violative of the Act (1 R., 463).

Doubtless his view that the petition did not put in issue the legality of these contracts but only whether they "were devised and are maintained by an unlawful combination" is based upon the formal opening words of the charge (1 R., 18.):

> The said defendant carriers * * * entered into and now maintain an agreement, combination, or conspiracy to use their power as such carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several States, * * * in violation of the aforesaid Act of July 2, 1890.

But were these words taken literally and allowed to control the sense of the allegations immediately following under a *videlicet*, setting forth the contracts, they would yet not support this view of the issue. For so taken, they charge, not that the 65 per cent contracts are maintained by an unlawful combination, but that by means of such contracts defendants maintain an unlawful combination—an entirely different allegation and one necessarily putting in issue the legality of the contracts.

Nor does the petition pray relief against any such combination to maintain the 65 per cent contracts. It prays that the contracts themselves be adjudged "contracts in restraint of trade and commerce among the several States" and enjoined (1 R., 25), showing that their legality was the issue tendered.

But even if the formal beginning of the charge could be so read, it could not, we submit, change the sense of the succeeding allegations, which, coupled with the prayer for relief, plainly put in issue the legality of these contracts.

The issue was so understood by defendants (1 R., 72, 82, 89, 101, 108, 110, 119, 120, 123), and also by Judges Gray and Buffington, both of whom gave opinions upon the legality of the contracts, the former holding that they are not violative of the Act of Congress (1 R., 418), the latter that they are (1 R., 441).

V.

THE CONTROL, THROUGH STOCK OWNERSHIP, BY READING COMPANY, A HOLDING CORPORATION, OF PHILADELPHIA & READING RAILWAY COMPANY AND THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, COMPETITIVE INTERSTATE CARRIERS, AND ALSO OF THE PHILADELPHIA & READING COAL & IRON COMPANY AND THE LEHIGH & WILKES-BARRE COAL COMPANY, COMPETITIVE PRODUCERS AND INTERSTATE TRADERS, CONSTITUTES A COMBINATION IN RESTRAINT OF TRADE AND A MONOPOLIZATION THEREOF, IN VIOLATION OF SECTIONS 1 AND 2 OF THE ACT OF JULY 2, 1890.

The petition (paragraph VIIc) charges in substance that in January, 1901, Reading Company, a holding corporation, then owner of the entire capital stocks of the Philadelphia & Reading Railway, a carrier of anthracite, and of The Philadelphia & Reading Coal & Iron Company, the largest owner, producer and seller of anthracite, pursuant to an agreement or combination with its shareholders and with the Philadelphia & Reading Railway and the Central Railroad of New Jersey and shareholders of the latter, "in violation of the aforesaid Act of July 2, 1890," acquired a majority of the shares of the said Central Railroad of New Jersey, which operates a competitive line, and owns nine-tenths of the capital stock of The Lehigh & Wilkes-Barre Coal Company, also a large owner, producer and seller of anthracite—

> thereby uniting and bringing together under a common head and source of control the said

> Philadelphia and Reading Railway Company and Central Railroad Company of New Jersey, operating parallel and competitive lines of railroad, and the said Philadelphia and Reading Coal and Iron Company and Lehigh and Wilkesbarre Coal Company, controlling * * * 63 per cent of the entire anthracite deposits, with the result of destroying every motive for competition, etc., etc. (1 R., 20, 21.)

"The uniting and bringing together under a common head and source of control the said * * * competitive lines of railroad and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company," by Reading Company's acquisition of the shares of the Central, is the substance of the combination charged, and the issue was so understood and met in the answer of the defendant Reading Company (1 R., 50) and on the argument below and by the judge there who discussed this branch of the case. (1 R., 455–57.)

The pleader, however, looking at the corporations as aggregations of persons, included the averment that Reading Company acquired the shares of the Central pursuant to an agreement or combination between it, Reading Company, and its shareholders, and the Philadelphia & Reading Railway and the Central and the majority shareholders of the latter who sold their holdings to Reading Company. This was done on the theory that Reading Company and Philadelphia & Reading Railway Company are in truth the same association of persons (*supra*, pp. 34–39), who became an unlawful combination by agreeing to acquire the shares of the competitive line, whose

majority shareholders in turn made themselves parties by agreeing to sell their shares to it.

This averment is now redundant and unimportant, however, for Reading Company being charged with actually acquiring a majority of the shares of the Central, "thereby uniting and bringing together under a common head and source of control the said * * * competitive lines of railroads and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company," it follows that if such acquisition violates the Act of Congress more need not be proved, on the familiar principle that "it is sufficient to prove so much of the charge as constitutes an offense punishable by law." (Shaw, C. J., in *Com.* v. *Griffin*, 21 Pick., 523, 525; *Com.* v. *O'Brien*, 107 Mass., 208; *Rex* v. *Hunt*, 2 Campb., 585; *Hall* v. *United States*, 168 U. S., 632, 639.)

The petition (paragraph VIIc) also makes the separate and distinct charge that—

> the said Reading Company, * * * in thus issuing additional shares * * * [and] bonds and giving them in exchange for a majority of the shares of * * * the said Central Railroad Company of New Jersey * * * monopolized the transportation between the several States formerly carried on by that company and the said Philadelphia & Reading Railway Company as competitors, and in so doing violated section 2 of the aforesaid act of July 2, 1890. (1 R., 21.)

The prayer in brief is that Reading Company be adjudged to have unlawfully acquired the shares of the Central Railroad of New Jersey, and that it be

enjoined from voting or receiving dividends on them; and for general relief. (1 R., 26, 28.)

The answer of Reading Company admits that, while beneficial owner of a majority of the shares of the Philadelphia & Reading Railway and The Philadelphia & Reading Coal & Iron Company, it acquired, in January, 1901, a majority of the shares of the Central Railroad of New Jersey; but avers that the two railroads are connecting, not competitive, lines, and that the transaction was not one of interstate commerce. (1 R., 42, 45–48, 50.)

In their separate answers the Philadelphia & Reading Railway and the Central Railroad of New Jersey, respectively, admit that they are common carriers engaged *particularly* in the transportation of anthracite, and that Reading Company is the beneficial owner of a majority of their shares; but deny that their lines are competitive. (1 R., 55, 56, 60, 74, 75.) The Central also admits owning nine-tenths of the shares of The Lehigh & Wilkes-Barre Coal Company. (1 R., 74.)

The Philadelphia & Reading Coal & Iron Company and The Lehigh & Wilkes-Barre Coal Company admit that they own and operate anthracite coal mines and buy and sell anthracite coal. (1 R., 91, 92, 110).

Judge Lanning's concurring opinion is the only one to discuss this branch of the case, and although he found (*a*) that "the Philadelphia & Reading and the Central were, previous to the combination, in the position of *competitive carriers of coal*," and (*b*) that "the argument that the Philadelphia & Reading and the Central were not competing but were connecting roads *is not sound*," and (*c*) that "the *necessary effect* of the combination was also *to eliminate all possible*

competition between the Philadelphia & Reading and the Central in the anthracite coal-carrying business" (1 R., 456—italics ours), the Court decreed (1 R., 467):

> That the charge made in paragraph VIIc of the petition concerning the combination by which it is alleged the Reading Company acquired a majority of the capital stock of The Central Railroad Company of New Jersey, in violation of the Act * * * approved July 2, 1890, is not sustained, and the petition in respect of that charge is dismissed.

This the Government assigned as error.

> The Court erred * * * in failing and refusing to find and adjudge, as charged in paragraph VIIc of the original petition, that the acquisition and holding by the defendant Reading Company of a majority of the shares of the defendant The Central Railroad Company of New Jersey was and is in violation of the aforesaid Act of July 2, 1890, and in failing and refusing to grant appropriate relief thereunto, and in dismissing the petition as to that charge. (Assignment of Errors, VI, 1 R., 471.)

Outline of the argument:

(A) Philadelphia & Reading Railway Company and The Central Railroad Company of New Jersey operate competitive lines from the sole area of production of anthracite across the States of Pennsylvania and New Jersey to tidewater at New York Harbor—the greatest market—and together transport 33 per cent of the total output moving from the mines.

(B) The Philadelphia & Reading Coal & Iron Company and The Lehigh & Wilkes-Barre Coal Company are competitive owners, producers, buyers, and sellers of anthracite in interstate commerce, together owning

or controlling 63 per cent of the entire deposits and marketing 25 per cent of the annual supply—29 per cent including the sales of a company affiliated with the Lehigh & Wilkes-Barre.

(C) A combination in any form which destroys the competition between two such carriers and two such owners, producers, buyers, and sellers of a staple article of commerce, "not as a result of normal methods of business development," restrains and monopolizes trade and commerce among the States in violation of the Act of July 2, 1890.

(A) PHILADELPHIA & READING RAILWAY COMPANY AND THE CENTRAL RAILROAD COMPANY OF NEW JERSEY OPERATE COMPETITIVE LINES FROM THE SOLE AREA OF PRODUCTION OF ANTHRACITE ACROSS THE STATES OF PENNSYLVANIA AND NEW JERSEY TO TIDEWATER AT NEW YORK HARBOR—THE GREATEST MARKET—AND TOGETHER TRANSPORT 33 PER CENT OF THE TOTAL OUTPUT MOVING FROM THE MINES.

Philadelphia & Reading Railway Company succeeded the old Philadelphia & Reading Rail*road* Company in 1896, and since then has operated a railroad system from various parts of the Southern and Western Middle anthracite fields to tidewater at Philadelphia and New York Harbor, over which anthracite and other freights move in continuous carriage. (The Facts Established, *supra*, p. 76; Maps, Govt. Exs. Nos. 13 and 203, 3 R.)

It has always been distinctively a carrier of anthracite. (Dice, 4 R., 645.) Of the total shipments thereof from the mines in 1907 it transported 14,018,795 gross tons—20.89 per cent. In the fiscal year 1907–8, anthracite constituted 58.57 per cent of the total freight originating on its lines and 33 per cent

of its total freight from all sources, and contributed a revenue of $13,026,030.58—41 per cent of its total gross receipts from freight traffic. (The Facts Established, *supra*, p. 78.)

The Central Railroad Company of New Jersey since long prior to January, 1901, has operated a continuous line from various parts of the Southern and Eastern Middle anthracite fields to New York Harbor. (The Facts Established, *supra*, p. 79; Maps, Govt. Exs. Nos. 13 and 203, 3 R.).

Even more than the Philadelphia & Reading Railway it is predominantly an anthracite carrier. Of the total shipments from the mines in 1907 it transported 8,714,113 gross tons—12.98 per cent. In the same year anthracite made up about 68 per cent of the total freight originating on its lines and 33 per cent of its total freight from all sources, and contributed a revenue of $9,753,871.41—48 per cent of its total gross receipts from freight traffic. (The Facts Established, *supra*, p. 79.)

The Philadelphia & Reading and the Central of New Jersey together transported a third of the anthracite moving from the mines.

Both the Philadelphia & Reading and the Central of New Jersey have power to build branch lines into all parts of the coal regions (2 Pepper & Lewis' Dig. Pa. Laws, 3926; 2 R., 608; 2 R., 628; *supra*, pp. 76, 79); and each, in common with railroad corporations in Pennsylvania generally, has "the right with its road to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination." (Const. of Pa., Art. XVII,

sec. 1; *Pennsylvania R. R.* v. *Commonwealth of Pennsylvania*, 7 Atl., 368, 372.)

New York Harbor is the principal market and distributing point for anthracite. (The Facts Established, *supra*, p. 51.) From there and Philadelphia the Central of New Jersey and the Philadelphia & Reading, respectively, with their marine services, are able to transport coal to common points along the Atlantic seaboard. (*Ibid.*, *supra*, p. 50.)

In Proposition II of the Argument (*supra*, pp. 160–170) we sought to establish that two such railroads are naturally competitors, whether they reach the same individual mines or not.

It now suffices to recall that it was there shown (*a*) that a decision of the Interstate Commerce Commission affirmed by this Court proceeded on the assumption that the Philadelphia & Reading and the Central of New Jersey and other roads of the anthracite group are naturally competitive (*Interstate Commerce Commission* v. *Baird*, 194 U. S., 25); (*b*) that roads similarly situated—in a position, indeed, less impelling to rivalry—have been deemed competitive by this Court (*Interstate Commerce Commission* v. *Chesapeake & Ohio Ry. Co.*, 200 U. S., 361, 397) and by the Interstate Commerce Commission (Rep., Jan. 25, 1907, under Res. of Congress, app. Mar. 7, 1906); (*c*) that two of the group, the Philadelphia & Reading and the Central of New Jersey, with which we are now particularly concerned, were expressly adjudged to be competitive by the Court of Chancery of New Jersey in *Stockton* v. *Central R. R. Company* (50 N. J. Eq., 52); and (*d*) that in testimony given in the present case those two, as also the rest of the group,

were explicitly and unqualifiedly admitted to be competitive by Mr. Baer, president of the Philadelphia & Reading and the Central of New Jersey (5 R., 1207), by Mr. Harris, his predecessor as president of the Philadelphia & Reading (2 R., 17, 18), by Mr. Thomas, now president of the Lehigh Valley and formerly president of the Erie and the New York, Susquehanna & Western (5 R., 1082, 1083, 1120), and by railway officials of lesser rank. (*Supra*, pp. 160–170.)

Further, it was shown in the statement of facts that the Philadelphia & Reading and the Central of New Jersey are competitive in the narrower sense that the *same* coal, to the extent of millions of tons, may move from the mining regions towards its destination over either. (The Facts Established, *supra*, pp. 80–83.)

Finally, the member of the Circuit Court who specially discussed this branch of the case, although holding for defendants on the ground that their motive was innocent, rejected their own defense that they were not competitive and found that—

> the Philadelphia & Reading and the Central were, previous to the combination, in the position of competitive carriers of coal even though they did not reach the same mines.

And that—

> the argument that the Philadelphia & Reading and the Central were not competing but were connecting roads is not sound. To a certain extent they did supplement each other, but * * * the Port Reading road gave to the Philadelphia & Reading an outlet to New York Harbor for its coal-carrying business, without the use of the Central's road, * * *. (Opinion of Lanning, J., 1 R., 456.)

Another member of the Court found that—

> These six defendant railroads are not only competitors with each other by virtue of the natural conditions incident to all common carriers, but being themselves, through their several subsidiary coal companies, * * * buyers of coal from operators, producers of coal themselves, and likewise sellers of such bought and produced coal, they are in keen competition with each other not only in transporting, but in buying coal to originate freights and in selling it to realize profits. (Opinion of Buffington, J., 1 R., 426.)

And no disagreement with his associates on this point was expressed by the third member.

In view of such rare unanimity it is hardly to be supposed that this question, so largely one of fact, will be reopened by this Court.

It may be argued again, however, as it was in the Circuit Court, that because the Philadelphia & Reading, on its way to Port Reading on New York Harbor, connects with the Central at Bound Brook, where the two roads exchange some classes of freight destined to and from Jersey City, only 25 miles distant, and between which points also the passenger trains of the Philadelphia & Reading use the tracks of the Central, that therefore the two roads are not competitive but supplementary and may be combined through a holding company without offense to the Act of Congress.

The complete answer is that anthracite, the principal article of traffic of the Philadelphia & Reading, and the very one in respect of which it is alleged in the petition to be a competitor of the Central, and

also its bituminous coal tonnage, go to New York Harbor all the way over tracks under its own control (The Facts Established, *supra*, pp. 76, 143); its predecessor, The Philadelphia & Reading *Railroad* Company, having built the Port Reading Railroad from near Bound Brook to Port Reading especially to secure "the means of supplying the markets with your [its] just proportion of the coal tonnage at all times." (2 R., 563.)

So, if it be granted that in the transportation of some classes of freight to New York Harbor the Central is supplementary to the Philadelphia & Reading for a short distance, that is certainly not true with respect to coal. And the law being that railroads which are competitive in a substantial and important degree may not be combined through a holding company, the case is complete when it appears that the Philadelphia & Reading and the Central are competitive in their main business, the transportation of anthracite from the mines.

As before stated, this contention was rejected in the Circuit Court. (1 R., 456.)

But we go further. If the Philadelphia & Reading did not transport coal all the way to New York Harbor over tracks under its own control, but delivered that as well as its general merchandise tonnage to the Central at Bound Brook, for carriage the rest of the way, the two would still be competitive. For a railroad which, leading from the source of production of a staple commodity in common with others, pushes its line forward until practically within sight of a great market reached by all the others, and there stops, delivering its freight to one of the others for the remaining short haul instead of

securing an entrance to the market over tracks under its own control, can not for that reason say that it is not a competitor of the others. Two roads between New York and Chicago with as much reason could say they were not competitors if the tracks of one extended only to the city limits of Chicago where its freight was delivered to the other to be hauled to a common terminal.

This must have been the view upon which the Philadelphia and Reading and the Central were held to be competitive lines in *Stockton* v. *Central R. R. Company* (*supra*), since at that time the Philadelphia & Reading did not, as now, have tracks of its own from Bound Brook to Port Reading, but had all of its tonnage, coal included, move from Bound Brook to New York Harbor over the Central.

Again, the Philadelphia & Reading has had for many years a permanent and continuing traffic agreement with the Central for the interchange of freight at Bound Brook (4 R., 529, 530); and since it has not acquired an entrance to Jersey City or the adjacent water front over tracks under its own control it may be assumed that it is to its own advantage to deliver to the Central at Bound Brook such freight destined for New York as it does not itself transport to Port Reading. There has been nothing to prevent it from building a road from Bound Brook to Jersey City or vicinity. Not want of means, for if it could buy control of the whole Central of New Jersey system surely it could build a railroad 25 miles long. Its predecessor did, in 1890, cause the construction of the road now in use from Bound Brook to Port Reading. (2 R., 563.) And only two or three years

before that the Lehigh Valley, a weaker system, promoted the construction of a line from South Plainfield, not far from Bound Brook (Map, Govt. Ex. No. 203) to Jersey City (Baird, 5 R., 742, 743); whilst in 1893 a yet weaker road, the New York, Susquehanna & Western, constructed commodious terminals at Edgewater, a most advantageous location, 5 or 6 miles north of Jersey City. (Johns, 4 R., 163, 197, 198, 206; Smith, 4 R., 244.)

The truth is that the Philadelphia and Reading, connecting in the immediate neighborhood of Bound Brook with not only the Central, but the Lehigh Valley as well (see Map, Govt. Ex. No. 203), both of which extend to Jersey City, is in a peculiarly strong position to interchange there freight and passengers to and from Jersey City, and therefore feels no necessity for tracks of its own into Jersey City. So far is it from being true that control of the Central is necessary to the Philadelphia & Reading to assure it an entrance to New York Harbor that we find the latter itself admitting, in its annual report for 1893, just after the cancellation of its lease of the former made in 1892, that not only was such control *not essential, but undesirable.* (2 R., 713.)

It is said that the Philadelphia & Reading and the Central also interchange large amounts of freight at Allentown and at Hauck's Switch (Ziegler, 4 R., 660, 661) or Tamanend (Auch, 4 R., 670), and that therefore again they are supplementary and not competitive. But this reasoning would make it difficult to find in the more compactly settled sections two railroads that are competitive. To illustrate, the Philadelphia & Reading exchanges freight with the Lehigh Valley

at the same three points as with the Central—Bound Brook, Allentown, and Tamanend or Hauck's Switch. (Auch, 4 R., 677; Map, 3 R., 496). Are the Philadelphia & Reading and the Lehigh Valley therefore not competitive, and could a holding company acquire the shares of both of these also?

It can not be that railroads competitive in their fundamental relation lose that character because they cross and exchange considerable bodies of freight.

Nor simply because the specific freight as to which they may be in active competition at a given time is not great as compared with their total tonnage. The question is rather whether the *relation* between them is competitive; whether they are situated so as to have the capacity to compete in substantial degree; that is, directly and substantially to influence the traffic, rates, or quality of service of each other.

This thought is forcibly expressed and illustrated by Judge Hook in *United States* v. *Union Pacific R. Co.* (188 Fed., 102, 124–25):

> A railroad company may have great, if not controlling, influence on competition, regardless of the amount of traffic it actually carries at the time. * * * It may at once be both a curb and a spur to other lines—a curb as regards rates, and a spur as regards quality of service, which are the two great points at which transportation touches the public interest. The influence of the Mississippi River and its navigable tributaries upon the trade and commerce of St. Louis is well known, yet of the enormous freight tonnage into and out of that city, largely interstate, scarcely one-half of one per cent moves by water. * * * But who would contend that if the rivers were the

subject of private ownership, instead of being common highways for the use of all, their control by a railroad company could not restrain trade or commerce because, as measured by relative percentages, the competition appeared to be so slight?

(B) THE PHILADELPHIA & READING COAL & IRON COMPANY AND THE LEHIGH & WILKES-BARRE COAL COMPANY ARE COMPETITIVE OWNERS, PRODUCERS, BUYERS, AND SELLERS OF ANTHRACITE IN INTERSTATE COMMERCE, TOGETHER OWNING OR CONTROLLING 63 PER CENT OF THE ENTIRE DEPOSITS AND MARKETING 25 PER CENT OF THE ANNUAL SUPPLY—29 PER CENT INCLUDING THE SALES OF A COMPANY AFFILIATED WITH THE LEHIGH & WILKES-BARRE.

The Philadelphia & Reading Coal & Iron Company is the largest owner, producer, and seller of anthracite. It owns or controls, as it estimated in 1891, 50 per cent—as estimated in 1896 by an outside authority, 42.25 per cent—of all the unmined deposits. It produced in 1907, a representative year, 12,304,608 tons—16 per cent of the total output—and purchased at the mines for resale approximately 1,428,152 tons, making 13,732,760 tons which it marketed—18 per cent of the total output. (The Facts Established, *supra*, pp. 30, 32, 33.)

Since long prior to January, 1901, it has sold its product generally throughout the country where anthracite is used, shipping it over the Philadelphia & Reading Railway and connections. (*Ibid.*, *supra*, pp. 78, 79.)

The Lehigh & Wilkes-Barre Coal Company, with The Lehigh Coal & Navigation Company, a partner, in effect, of the Central Railroad of New Jersey (*supra*,

p. 40), possesses 17.30 per cent of the unmined deposits of anthracite. It produced in 1907, by itself, 4,451,033 tons, and with the Navigation Company, 7,629,049 tons—9.93 per cent of the total production. In the same year it purchased at the mines for resale approximately 971,508 tons, making 5,422,541 tons—7 per cent of the total—that it marketed alone, and 8,600,557 tons—11 per cent—in conjunction with the Navigation Company. (The Facts Established, *supra*, pp. 30, 32, 33.)

Since long before January, 1901, it has sold its product in the markets of New York and other Eastern States, shipping it over the Central Railroad of New Jersey and connections. (*Ibid.*, *supra*, p. 80.)

Mr. Baer, president of both companies, admitted that they are naturally competitive. (5 R., 1208.)

In the annual report of Reading Company for 1901 it is stated that by acquiring control of the Central and the Lehigh & Wilkes-Barre company—

> the Reading system now owns and controls about 63 per cent of all the unmined anthracite coal in the State of Pennsylvania. (2 R., 567.)

(c) A COMBINATION IN ANY FORM WHICH DESTROYS COMPETITION BETWEEN TWO SUCH CARRIERS AND TWO SUCH OWNERS, PRODUCERS, BUYERS, AND SELLERS OF A STAPLE ARTICLE OF COMMERCE, "NOT AS A RESULT OF NORMAL METHODS OF BUSINESS DEVELOPMENT," RESTRAINS ANL MONOPOLIZES TRADE AND COMMERCE AMONG THE STATES IN VIOLATION OF THE ACT OF JULY 2, 1890.

Reading Company, under the name National Company, with a capital of $50,000, had lain dormant at least eighteen years,[1] without business or prop-

erty, when, in 1896, it was raised from the dead, and, with its capitalization increased to $275,000,000—stock, $140,000,000, bonds, $135,000,000—took over the entire capital stock of The Philadelphia & Reading Coal & Iron Company, of which The Philadelphia & Reading *Railroad* Company had just been divested through foreclosure proceedings, and also the entire capital stock of Philadelphia & Reading *Railway* Company, successor of the *Railroad* Company. (The Facts Established, *supra*, pp. 36–39.)

This method of reuniting the coal company with the railroad was adopted, instead of the old plan, as a concession to the Constitution of Pennsylvania, which now prohibited any common carrier, directly or indirectly, to engage in mining or manufacturing articles for transportation over its line. (*Ibid.*, *supra*, p. 35; Baer, 5 R., 1203, 1204.)

Thus, Mr. Baer testified (5 R., 1203, 1204):

> Q. Could not that have been done with the railroad?—A. No; it could not have been done under our laws. The railway company could not have held under a reorganization.
>
> Q. Why?—A. Because there was no statutory power.
>
> Q. It did hold under the old system?—A. I know, but when we reorganized we had to accept the provisions of the new constitution, which prohibits that.

And in an official opinion dated January 2, 1897, the Attorney General of Pennsylvania declared that—

> The obvious purpose of this part of the scheme of reorganization seemed to be to escape from that provision of the Constitution of 1874 which forbids any incorporated company doing the business of a common carrier

to directly or indirectly engage in mining or manufacturing articles for transportation over its lines; or, stated differently, the union of the coal company with the railroad company.

Such was the corporation—by its origin and history "wholly inconsistent with the * * * conception of advancing the development of business power by usual methods" (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 76)—which, in 1901, while holding all the shares of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company, acquired a majority of those of The Central Railroad Company of New Jersey, owner of nine-tenths of The Lehigh & Wilkes-Barre Coal Company (The Facts Established, *supra*, p. 84), thereby combining under one control the two competitive railroads, transporting 33 per cent of the total output moving from the mines, and the two competitive coal owning, producing, buying, and selling companies, together controlling 63 per cent of the entire deposits of anthracite and marketing upwards of 25 per cent of the annual supply.

(1) If only the two competitive railroads had been combined through this holding company, the Act of July 2, 1890, would have been violated.

As regards the application of the Act to railroads, successive judgments of this Court establish that limited (if at all) only "by the power which each *individual* has to manage his own property and determine the place and manner of its investment" (per Mr. Justice Brewer, *Northern Securities Co.* v. *United States*, 193 U. S., 197, 361), every contract or combination, in whatever form, which directly or immediately destroys the competition between two

or more substantially competitive interstate railroads, restrains and monopolizes trade among the States. (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S., 505; *Northern Securities Co.* v. *United States*, 193 U. S., 197; *Harriman* v. *Northern Securities Co.*, 197 U. S., 244; see also *Pearsall* v. *Great Northern R. Co.*, 161 U. S., 646; *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S., 677.)

> That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. (*United States* v. *Trans-Missouri Freight Ass'n*, *supra*, p. 337.)
>
> The natural, direct, and immediate effect of competition is, however, to lower rates and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement whose first and direct effect is to prevent this play of competition restrains instead of promoting trade and commerce. (*United States* v. *Joint Traffic Ass'n*, *supra*, p. 577.)
>
> Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers * * *. (*Northern Securities Co.* v. *United States*, *supra*, p. 352.)
>
> But the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the

statute, no matter what the tenure of title was. (*Harriman* v. *Northern Securities Co.*, *supra*, p. 291.)

And since the judgments in the foregoing cases were expressly approved by later cases which establish also that suppression of competition, if only incidental to "normal methods of industrial development" not by their nature or effect tending to produce the evils of monopoly, does not offend the Act of Congress (*Standard Oil Co.* v. *United States*, 221 U. S., 1; *United States* v. *American Tobacco Co.*, 221 U. S., 106), it must be a corollary of the proposition stated, that combinations to maintain the rates of, or to bring under one control, two or more naturally and substantially competitive railroads, are not "normal methods of industrial development," but, on the contrary, by "nature" and "necessary effect and the character of the parties," are "clearly restraints of trade within the purview of the statute." (*Standard Oil Co.* v. *United States*, *supra*, p. 65.)

Whilst a trading corporation will be shut off altogether from enlargement and development by acquisition unless permitted, as an incident of normal growth, to acquire competing businesses within limits, the case is different with railroads. Forbidding them to acquire competitive lines does not shut off their opportunities of growth by acquisition. They are free to acquire supplementary lines. And the natural and normal way, other than by new construction, for a railroad to develop, is by acquiring supplementary lines which with its own form a continuous route; also branches, but not competitive lines.

This theory of normal growth as regards transportation lines is exemplified in the laws of most of the States of the Union (cited in Appendix C), which, while authorizing the consolidation of lines forming a continuous route, uniformly prohibit the consolidation of competitive lines.

It was also recognized by this Court in *Standard Oil Co.* v. *United States* (221 U. S., 1, 80):

> If various corporations owning the lines [pipe lines] determined in the public interests to so combine as to make a *continuous* line, such agreement or combination would not be repugnant to the Act. * * * [Italics ours.]

In thus prohibiting every contract or combination which would destroy the competitive relation between substantially competitive interstate railroads, so far from having done anything new or revolutionary, Congress has but followed the common law (*Gibbs* v. *Consolidated Gas Co.*, 130 U. S., 396; *Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S., 677; *Pearsall* v. *Great Northern R. Co.*, 161 U. S., 646; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 334; *Central R. Co.* v. *Collins*, 40 Ga., 582; *People* v. *Chicago Gas Trust Co.*, 130 Ill., 268; *Milbank* v. *New York, etc., R. Co.*, 64 How. Pr., 20; *Pearson* v. *Concord R. Co.*, 62 N. H., 537; *Memphis & Charleston R. Co.* v. *Woods*, 88 Ala., 630; *Noyes, Intercorp. Rel.*, sec. 292; *Cook, Stock & Stockholders*, sec. 315; *Morawetz*, 22 Harv. L. Rev., 492, 495); and the constitutions and statutes of more than three-fourths of the States (cited in Appendix C).

Again, it is equally well settled by decisions of this Court that where a contract or combination is "sufficient in itself to produce a result which the law seeks to prevent"—where such result is its "necessary effect"—the parties "intentionally break the law in the only way in which the law ever considers intent." (*Swift & Co.* v. *United States*, 196 U. S., 375, 396; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 342; *Ellis* v. *United States*, 206 U. S., 245, 257; *Standard Oil Co.* v. *United States*, 221 U. S., 1, 58, 65; *United States* v. *American Tobacco Co.*, 221 U. S., 106, 179.) Or, what is the same thing, "they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement." (*Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 234, 243; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 341, 342; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed., 610, 619, 623; *United States* v. *Union Pacific R. Co.*, 188 Fed., 102, 114.) In *United States* v. *Trans-Missouri Freight Ass'n* (*supra*), the judgment in which was approved in *Standard Oil Co.* v. *United States* (*supra*), the intent to suppress competition and restrain trade alleged in the bill was specifically denied in the answer and not proved (p. 341); yet the bill was sustained.

With these propositions established it was a logical step to the conclusion that the acquisition by one corporation of controlling stock interests in two or more competitive railroads, destroying of its own force the competitive relation between them, restrains and monopolizes trade among the States. This

was taken in the *Northern Securities Company's case.* (193 U. S., 197.)

There it was held that the controlling shareholders of the two competitive railways, in jointly procuring the Securities Company to exchange shares of its stock for a majority of those of the two railways, with the necessary effect of suppressing competition between them, created a combination in restraint of trade in violation of Section 1 of the Act of July 2, 1890, and also that the acquisition of the shares by the Securities Company monopolized trade within the meaning of Section 2.

Having reached the conclusion that Section 1 had been violated, the judges devoted little space to Section 2. Enough was said, though, to show that they held that Section 2 had also been broken. Thus, in the opinion of Mr. Justice Harlan, it was asked (p. 320):

> Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the states, or with foreign states? *Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce?* Let us see what are the facts disclosed by the record. [Italics ours.]

Having seen what the facts were, the answer was (p. 325):

> In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the Act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations,

> *and forbids attempts to monopolize such commerce or any part of it.* [Italics ours.]

Mr. Justice Brewer, concurring, said (p. 363):

> It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly; and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly.

Since, as the Court held, by the established construction "every combination or conspiracy which would extinguish competition between otherwise competing railroads is made illegal by the Act" (pp. 331, 352), and the "inevitable result" of this combination being, as also held, so to extinguish competition (p. 328), the purpose of the parties was unimportant.

It is true that, meeting defendants' repeated protestations of good intentions, the Court mentioned that the obvious motive or purpose of the combination was to suppress competition, just as it is here. But that the effect, not the motive or purpose, of the combination, was the basis of its decision, necessarily follows from the premises. Moreover, it is so stated in the opinion. (193 U. S., 328, 331, 337.)

It is likewise so recognized in *United States* v. *Union Pacific R. Co.* (188 Fed., 102, 114), decided by a court two of whose members participated in the *Northern Securities Company's case.*

In *Harriman* v. *Northern Securities Company* (197 U. S., 244), this Court held that the decision in the *Northern Securities Company's case* would have been the same whether the latter had acquired the shares

of the two railways merely as custodian or trustee for its promoters or as an absolute purchaser in its own right (p. 291), although in fact it did acquire them, the Court added, as a purchaser in its own right (p. 292).

It must also have been the same whether the holders of the shares of the rival roads had first combined to sell and to procure the Securities Company to buy them, or whether the latter of its own motion had made the purchase from such shareholders severally and unassociated.

For, since a combination to do by lawful means that which does *not* restrain or monopolize interstate commerce can not be a combination in restraint thereof, so, therefore, only if the purchase of the shares of the rival roads by the third corporation would restrain and monopolize interstate commerce could it have been adjudged that a combination procuring such purchase is one that restrains and monopolizes interstate commerce.

And it being thus established, as a corollary of that case, that such purchase by the third corporation on its own initiative and without concert of action by the sellers would operate as a restraint of interstate commerce and a monopolization thereof, the offense against Section 2 is complete without more, while it but remains to find in the transaction the concomitant contract or combination to bring it within the precise letter of Section 1. This is not difficult.

It is a perfectly logical concept that the *purchase* by one corporation of controlling stock interests in two or more, whether or not preceded by concerted action by the holders of the shares to effect such sale, may create a combination. This has been pointed out by

Mr. Morawetz in an analysis of the *Northern Securities Company's case*. (17 Harv. L. Rev., 534.)

Whilst a conspiracy is an *act*, in which, of course, two or more must concur, a combination may be either an act or a state of being (2 Cent. Dic., 1118, 1213). From which it follows that a combination may be formed either of persons or of instrumentalities; and a combination of two or more competitive instrumentalities of commerce—railroads—is not less a combination because effected by one person.

In reality a corporation is a combination of stockholders held together by a "bundle of contracts," and when necessary to the ends of justice its acts must be treated as those of a combination.

Again, the purchase of the shares is itself a contract, a contract of bargain and sale. (Lurton, J., in *Marble Co.* v. *Harvey*, 92 Tenn., 115; *Langdon* v. *Branch*, 37 Fed., 449.) If it be said that viewing the purchase as a contract it is an executed one and so can not be enjoined, the answer is that it is "violations of this Act" which the circuit courts are authorized "to prevent and restrain"; and therefore a continuing violation of the Act—a continuing restraint or monopolization of trade—must be enjoined whether, technically speaking, the contract which produces the condition be executed or not. In other words, since it is the resulting restraint or monopolization of trade which is to be "prevented," "restrained," "enjoined," the test is whether that, not the contract producing it, is of continuing effect. In the *Northern Securities Company's case* both below and in this Court a like contention was made and overruled. (193 U. S., 357.)

The same reasoning must hold where the restraint is produced by a contract.

Finally, in the most recent cases this Court has held that a transaction within "the spirit or purpose of the prohibitions of the law" cannot escape by any possible variety of form—

> that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute. (*United States* v. *American Tobacco Co., supra*, p. 181.)

It is thus unimportant whether to describe such a purchase as constituting a combination or a contract or merely an act.

If there were need for confirmation, outside the decision itself, of the above statement of the scope of the *Northern Securities Company's case*—namely, that the Act of July 2, 1890, is violated by the purchase of controlling interests in the shares of two competitive railroads by a third corporation whether the holders of the shares first combine to procure the third corporation to buy them or whether the latter makes the purchase on its own initiative—it would be found in the fact that such was also the understanding of the issue held by the dissenting members of the Court and by counsel for defendants.

Thus, Mr. Justice White, speaking for the dissenting justices, said (pp. 366, 367):

> Two questions arise. Does the Antitrust Act, when rightfully interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two

railroads? and, second, If it does, had Congress the power to regulate or control such acquisition and ownership?

Mr. Justice Holmes also said for them (p. 406):

> It would seem to me * * * still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of section 1 applies to the defendants here.

Finally, that the gravamen of the *Northern Securities Company's case* was that the Act is violated by the concentration in a single corporation of controlling stock interests in two competitive railroads, and that it was alike without bearing upon the underlying principle by what tenure or for what purpose the Securities Company held the shares of the two railways, or whether it was procured to hold them by a combination among the transferers or held them by its own independent action, appears from the statement of the scope of that case in *Harriman* v. *Northern Securities Company* (197 U. S., 244, 291).

And also from the further ruling in the last-named case, that the Northern Pacific and Union Pacific systems being competitive, a constituent company of the latter could not acquire from the Northern Securities Company its holdings of Northern Pacific stock (p. 297):

> And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock * * * would directly contravene the object of the Sherman law and the purposes of the government suit.

> The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

Whilst it is the end of the matter if this Court has decided that the purchase by one corporation of controlling stock interests in two or more competitive railroads restrains and monopolizes trade within the Act of Congress, nevertheless a reference to leading authorities holding the same thing contrary to the common law on similar grounds can not be amiss (*Louisville & Nashville R. Co.* v. *Kentucky*, 161 U. S., 677; *Pearsall* v. *Great Northern R. Co.*, 161 U. S., 646; *Central R. Co.* v. *Collins*, 40 Ga., 582; *People* v. *Chicago Gas Trust Co.*, 130 Ill., 268; *Milbank* v. *New York, etc., R. Co.*, 64 How. Pr., 20; *Pearson* v. *Concord R. Co.*, 62 N. H., 537; *Memphis & Charleston R. Co.* v. *Woods*, 88 Ala., 630; *Noyes, Intercorp. Rel.*, sec. 292; *Cook, Stock and Stockholders*, sec. 315); since not only is that "the system from which our judicial ideas and legal definitions are derived" (*Moore* v. *United States*, 91 U. S., 270, 274), but in respect of restraints of trade and monopolies Congress, by the Act of July 2, 1890, has made the common law, *with widened scope*, the very law of the United States. (*Loewe* v. *Lawlor*, 208 U. S., 274, 296.)

In *Louisville & Nashville R. Co.* v. *Kentucky* (*supra*), the question was whether a grant to appellant to consolidate with or purchase the shares of other railroads without restriction could be subsequently taken away as to competitive lines, so far at least as it remained unexecuted, by an

enactment prohibiting any railroad to consolidate its stock with, or acquire by purchase, lease, or otherwise, any railroad owning a parallel or competitive line, *no right to amend the charter having been reserved.* This Court held that the prohibition was "necessary for the protection of the public interests" and therefore valid, since the acquisition by one company of competitive railroads or their capital stocks is contrary to public policy (pp. 697, 698):

> Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, *but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void.* (Cook, Stock & Stockholders, sec. 315; *Central R. Co.* v. *Collins,* 40 Ga., 582; *Hazelhurst* v. *Savannah, etc., R. Co.,* 43 Ga., 13; *Elkins* v. *Camden & A. R. Co.,* 36 N. J. Eq., 5.) [Italics ours.]

Observe that the Court says that while the purchase of shares in one road by another not a competitor, in the absence of express authority, is beyond the power of the particular road but nothing worse, the purchase of shares in one by another which is a competitor is not only beyond the power of the particular road but contrary to public policy and void; that is, contrary to the common law. Why is the transaction contrary to public policy when the roads are competitive and not when they are non-competitive? Obviously because where the roads are competitive the purchase by one of shares in the other tends necessarily to suppress competition between them and monopolize commerce.

Also in *Pearsall* v. *Great Northern R. Co.* (*supra*), where the question was substantially the same, this

Court held that it is contrary to public policy, because destructive of competition and promotive of monopoly, for one of two competitive railroads to acquire a controlling stock interest in the other (pp. 674, 675):

> We think it was competent for the legislature to declare that the power it had conferred upon the Minneapolis & St. Cloud Railway Company to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads.

In *Central Railroad Co.* v. *Collins* (*supra*), cited by this Court in *Louisville & Nashville Railroad Co.* v. *Kentucky* (*supra*), the Central Railroad and the Southwestern Railroad had purchased jointly from the city of Savannah a third of the shares of a competitive line, Atlantic & Gulf Railroad. Certain minority shareholders brought a bill to rescind the purchase on the grounds that it was beyond the charter powers of the companies making it and contrary to public policy—contrary to public policy because restricting competition between rival railroads. The Supreme Court of Georgia decided that on both of these grounds it was unlawful for either the Central or the Southwestern Railroad to hold the shares of the Atlantic & Gulf Railroad. Of the second ground it said (p. 628):

> It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise and success to railroads as to other human undertakings. It has been the conflict with

> thirty State lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior, that has begotten the mighty network of iron which interlaces our extensive territory, and I am convinced that there is no public policy more striking than that which, whilst it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies.

In *People* v. *Chicago Gas Trust Co.* (*supra*), defendant had been created under a law of Illinois providing for the organization of corporations "for any lawful purpose," its articles of incorporation declaring one of its purposes to be "to purchase and hold or sell the capital stock * * * of any gas works or gas company or companies * * * in Chicago * * * or elsewhere in * * * Illinois." The State contended that this was not a "lawful purpose" under the common law, as carrying it out might lead to the establishment of a monopoly in the manufacture and sale of gas in the city of Chicago. Defendant had, in fact, already acquired a majority of the shares of four other gas companies there. The Supreme Court of Illinois sustained this contention, saying (p. 293):

> Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy.

From this review of leading cases it appears that at common law, in this country at any rate, it is not

merely *ultra vires* but also contrary to public policy, because destructive of competition and promotive of monopoly in a public service, for a railroad to acquire a controlling interest, if not, indeed, any interest, in the shares of a competitive line. And if this violates the common law it violates also the law of the United States, when the roads are interstate lines, for in the Act of July 2, 1890, Congress, with respect to interstate commerce, has enacted into the statute law of the United States the inhibitions of the common law against agreements and monopolies in restraint of trade. In *Loewe* v. *Lawlor* (208 U. S., 274, 296, 297), this Court, answering the contention that—

> even conceding that the declaration states a case good at common law * * * it does not state one within the statute,

declared that—

> *United States* v. *Trans-Missouri Freight Ass'n*, (166 U. S., 290), *United States* v. *Joint Traffic Ass'n* (171 U. S., 505), and *Northern Securities Co.* v. *United States* (193 U. S., 197) hold, in effect, that the antitrust law has a broader application than the prohibition of restraints of trade unlawful at common law.

Thus, whether we look to the terms of the Act of Congress or turn to the precedents of the common law, the conclusion is that the concentration in a single corporation of controlling stock interests in two or more substantially competitive railroads restrains and monopolizes trade.

(2) But leaving the railroads out of consideration, there would still be here a combination of competitive owners, producers, buyers, and sellers of anthracite coal, in violation of the Act of Congress as con-

strued by this Court in *Standard Oil Co.* v. *United States* (221 U. S., 1) and *United States* v. *American Tobacco Co.* (221 U. S., 106.).

Those cases support the following propositions:

(*a*) Any combination, not the "result of normal methods of industrial development," which by destroying competition between traders tends in the long run, if not immediately, to enhance prices and produce the other evils of monopoly, restrains and monopolizes trade.

(*b*) That a combination is not the "result of normal methods of industrial development" may be determined by its own "inherent nature or effect."

(*c*) Where it does not appear from the "inherent nature or effect" of a combination that it is not the "result of normal methods of industrial development," the question must be determined in the light of all the surrounding circumstances of the given case, including the purpose of the parties.

Applying these principles to the present case, we have competition destroyed forever between two corporate owners, producers, buyers, and sellers of anthracite coal engaged in interstate commerce, by vesting control of each in a third corporation—a mere holding company—not itself engaged in mining or selling coal or any other business.

What is more, these two are the largest owners of anthracite coal. Together they own or control 63 per cent of the entire deposits and market upwards of 25 per cent of the annual supply.

Further, since according to the generally accepted calculations of the expert Griffith (Govt. Ex. No. 157, 3 R., 328) the coal areas of these companies will outlast by many years those of any other, it is only

a question of time before this combination, if not dissolved, will have an absolutely complete monopoly

This suggests a consideration which renders any contract or combination monopolizing anthracite coal peculiarly prejudicial to the public interest.

In most any other branch of trade—tobacco or oil, for example—it is at least possible for a monopoly to be broken by the influx of fresh capital attracted by high profits; but against a monopoly in anthracite, the supply of which is limited, there can be no such protection.

The New York Court of Appeals has well said (*Arnot* v. *Pittston &c. Coal Co.*, 68 N. Y., 558, 566):

> No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited.

Will it be contended that this combination was the "result of normal methods of industrial development"?

That only "with the legitimate purpose of reasonably forwarding personal interest and developing trade" was Reading Company, eighteen years dormant without property or business, made to increase its capitalization in a night from $50,000 to $275,000,000 and become the holder of every share of stock of Philadelphia & Reading Railway Company and The Philadelphia & Reading Coal & Iron Company?

That Reading Company in its rebirth was anything but a device to evade the provision of the Pennsylvania Constitution prohibiting railways directly or indirectly to mine articles for transportation over their lines?

That with the Philadelphia & Reading Railway and The Philadelphia & Reading Coal Company already in its grasp, it was still but developing the coal trade in a normal and usual way, though itself neither owner, producer, or carrier of coal, when it acquired control of the Central Railroad of New Jersey and its affiliated coal company, thereby bringing under its absolute dominion the carriers of 33 per cent and the owners of 63 per cent of all the anthracite?

Whilst within limits the acquisition and operation of the plants of competitive companies by a corporation actually engaged in trade may be deemed an incident of normal growth, the acquisition of the stocks of two or more such companies by a holding corporation, not itself engaged in trade, for the purpose of centralizing control, is no more a normal method of developing trade than the similar centralization of control in common trustees under the old form of trust. The holding company, indeed, is but the old trust in corporate form.

Reading Company exists and is designedly utilized for the *purpose* of uniting in violation of the law of Pennsylvania the Philadelphia & Reading Railway and The Philadelphia & Reading Coal & Iron Company, and of combining these with the Central Railroad of New Jersey and The Lehigh & Wilkes-Barre Coal Company, thereby bringing under one control competitive railroads transporting 33 per cent of the anthracite moving from the mines, and competitive producers, buyers, and sellers, owning 63 per cent of the total supply, in violation of the law of the United States. It has no other function.

(3) The present combination of the Philadelphia & Reading Railway and the Central Railroad of New

Jersey and their affiliated coal companies through a holding company is but a renewal in slightly different form of the attempted combination in 1892 of the same railroads and coal companies by a lease from the Central to a subsidiary company of the Philadelphia & Reading, declared unlawful by the Courts of New Jersey in *Stockton, Attorney General,* v. *Central R. R. et al.* (50 N. J., Eq., 52.)

The facts of that case were as follows: The Central Railroad of New Jersey, with a line between the anthracite fields and tidewater, owned then as now nearly all the stock of The Lehigh & Wilkes-Barre Coal Company. The Philadelphia & Reading Railroad, also operating a line between the anthracite fields and tidewater, owned all the stock of The Philadelphia & Reading Coal & Iron Company. The third defendant, the Port Reading Railroad, was organized in New Jersey to construct and operate a short line connecting the Philadelphia & Reading Railroad with a tidewater terminal, and was owned and controlled in the interest of the latter. The Port Reading Railroad leased the properties of the Central Railroad of New Jersey for 999 years, covenanting to pay annually to the latter enough to enable it to meet its fixed charges and a dividend of 7 per cent. The performance of the lease on the part of the Port Reading Railroad was guaranteed by the Philadelphia & Reading Railroad in a tripartite agreement between those two and the Central. The effect of this lease and guaranty was to bring into alliance the Central and the Philadelphia & Reading and their respective coal companies, which together controlled about two-

thirds of the total unmined anthracite deposits. In New Jersey a lease of a domestic railroad to a foreign corporation was forbidden, which explains why this lease was not made directly to the Philadelphia & Reading.

On these facts the Attorney General of New Jersey filed an information charging that the lease and tripartite agreement were—

> in pursuance of a scheme between the defendants to restrict or prevent competition in the production and sale of anthracite coal, a staple commodity in this State, and thereby to effect an increase in the price thereof, * * * and in violation of the statute approved May 2, 1885, * * * [which forbade a railroad corporation of New Jersey to be leased to a foreign corporation];

and praying that the lease and tripartite agreement be annulled and set aside and that the defendants be enjoined—

> from all future combinations to do that which will arbitrarily increase, or tend to increase, the price of coal to the inhabitants of New Jersey (50 N. J. Eq., 53, 490).

Sustaining the Attorney General, the Court held (1) that "the lease was made not only without legal sanction but in defiance of an expressly prohibitory statute" (p. 78), and (2) that the combination of the defendants, controlling about two-thirds of the total anthracite deposits, "tends to a disastrous monopoly in coal," which "portends the greatest danger to the public welfare," making the case "clearly one in which the Attorney General may, and should, ask the assistance of this Court" (pp. 84, 85).

In his opinion the Chancellor said (pp. 81, 84, 85):

> There are peculiar features in the transaction now considered that evince a public danger much more serious than appears in the mere transfer of corporate duties to performance by a foreign corporation. The real lessor and lessee here are extensive producers and carriers of anthracite coal. They constitute two of the six great anthracite coal carriers from the coal regions of Pennsylvania to this and adjoining States. It is disclosed that the real lessee has secured a lease of the Lehigh Valley Railroad Company, and that thereby, and by the lease in question, it controls three of the six great coal carriers referred to, and also that the alliance thus formed now controls, through the instrumentality of coal companies, the capital stock of which these combined carriers own, more than one-half of all the anthracite coal fields in Pennsylvania.
>
> * * * * *
>
> Here, then, we have great coal dealers, complaining that they are not sufficiently paid for the produce of their mines, combining, so that already they control more than one-half of the coal fields upon which this State depends for fuel, and looking to the cooperation of the remaining anthracite coal producers to effect a change in the price of their output, so that they may have more satisfactory returns from their investment. To say that these conditions do not tend to a disastrous monopoly in coal, would be an insult to intelligence.

On the employment of a subsidiary to do what the parent company is prohibited to do, a familiar practice in the case at bar, the Chancellor was plain-spoken. (Pp. 82, 83, 86.) To quote but a few lines:

> Whatever may be the nominal ownership or the legal title, for the substantial purposes of the injury apprehended and the Attorney General's complaint, the railroad companies stand as the owners of the coal lands in this Court.

This case was not appealed to the Court of Errors and Appeals, but has been "approved and acted upon" by it. (*McCarter* v. *Firemen's Ins. Co.*, et al., 73 Atl., 80.)

(4) Let us now examine the reasoning by which the Circuit Court sustained its conclusion that the acquisition of a majority of the shares of the Central Railroad of New Jersey by Reading Company was not unlawful.

With the exception of Judge Gray's statement of his conclusion that Reading Company's acquisition of the shares of the Central was neither intended nor had the effect to restrain interstate commerce (1 R., 422), Judge Lanning alone discusses the charge of the petition in respect to this transaction.

As already seen, the ground upon which defendants relied to take this combination out of the Act of Congress—that the Philadelphia & Reading and the Central are not competitive but supplementary lines (1 R., 45, 46, 75)—was promptly rejected by Judge Lanning, who found the contrary (1 R., 456; also, *supra*, p. 263.)

On the other hand, a main ground on which the Government relied to bring the combination within the Act—that its necessary effect was to suppress competition between the two railways—was sustained by the learned judge (1 R., 456):

> The necessary effect of the combination was also to eliminate all possible competition be-

> tween the Philadelphia & Reading and the Central in the anthracite coal carrying business.

On what ground, then, does he hold it no violation of the Act for Reading Company to acquire a majority of the shares of the Central Railroad of New Jersey?

On the ground that "the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central," which he supposed to be threatened in that, as he found, the Baltimore & Ohio Railroad was a prospective purchaser of the shares of the Central and had it purchased them might have abrogated or obstructed the Philadelphia & Reading Railway's agreement with the Central for the interchange at Bound Brook of certain classes of traffic bound to and from New York. We quote his language (1 R., 456–57):

> In December, 1900, Mr. Baer, president of the Philadelphia & Reading Railway Company, was informed that a majority of the capital stock of the Central Railroad Company of New Jersey was on the market for sale, and that the Baltimore & Ohio Railroad Company was a prospective purchaser of it. Fearing that if the control of the Central should pass into the hands of the Baltimore & Ohio, the Philadelphia & Reading would lose the benefit of its contracts for joint through routes and be disastrously hampered in, if not excluded from, the use of the Central's New York terminals, he quietly bought the stock for the Reading Company. Evidently the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central. The

> direct effect of the purchase was to preserve them. The necessary effect of the combination was also to eliminate all possible competition between the Philadelphia & Reading and the Central in the anthracite coal carrying business. In the circumstances, however, such elimination, though a necessary result of the combination, was incidental to its main purpose and not in contravention of the antitrust act as it has heretofore been construed.

To this the first and sufficient answer is that the conscious motive or purpose of Reading Company in making the purchase is immaterial if, as found by Judge Lanning—

> the necessary effect of the combination was to eliminate all possible competition between the Philadelphia & Reading and the Central in the anthracite coal carrying business. (1 R., 456.)

For a combination of that nature and effect is prohibited by the Act of Congress (*supra*, pp. 277–292); and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or purpose. (*United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 234, 243; *Swift & Co.* v. *United States*, 196 U. S., 375, 396.) The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. (*Bishop, New Criminal Law*, sec. 343; *Holmes, The Common Law*, p. 52.)

As observed by Mr. Justice White in a similar case—

> the contention just noticed proceeds upon the mistaken legal conception that the applica-

> tion of the statutory prohibitions depends not upon whether the *effect* of the acts done is to violate those prohibitions, but upon whether the carrier *intended* to violate the statute. (*Interstate Commerce Commission* v. *Chesapeake & Ohio R. Co.*, 200 U. S., 361, 398.) [Italics ours.]

The unsoundness of Judge Lanning's position is further demonstrated by contrasting the reasoning in similar circumstances of the Circuit Court for the district of Utah—Circuit Judges Sanborn, Van Devanter, Hook, and Adams, sitting—in *United States* v. *Union Pacific R. Co.* (188 Fed., 102).

There it was found that the "actuating purpose" of the Union Pacific Railroad in acquiring what was alleged to be a controlling stock interest in the Southern Pacific Railroad was "to secure a permanent working and reliable connection at Ogden over an existing road for its through traffic" (p. 114). But the Court was careful to add (p. 114):

> We recognize the proposition that, if the necessary and direct result of the purchase of the Huntington stock was to destroy or substantially suppress free and natural competition, before then existing between the two companies, or if that purchase put it within the power of the Union Pacific company to destroy or suppress such competition, the latter named company would undoubtedly be held to have intended the natural and reasonable consequences of its act, *and notwithstanding the dominant purpose just mentioned*, would have violated the antitrust law. [Italics ours.]

Here, however, although, as expressly found, "the necessary effect of the combination was to

eliminate all possible competition between the Philadelphia & Reading and the Central in the anthracite coal-carrying business" (1 R., 456), it was yet held not to violate the Act of Congress, because the elimination of such competition was not thought to be the purpose.

This would make conscious purpose or intent the controlling test, whereas this Court from the first has held that a contract or combination by its own "inherent nature or effect," without more, may "restrain trade within the purview of the statute." (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 65; *United States* v. *American Tobacco Co.*, 221 U. S., 106, 179; *Harriman* v. *Northern Securities Co.*, 197 U. S., 244, 291, 298; *Northern Securities Co.* v. *United States*, 193 U. S., 197, 328, 331, 337; *Addyston Pipe Co.* v. *United States*, 175 U. S., 211, 234, 243; *United States* v. *Joint Traffic Ass'n*, 171 U. S., 505, 561; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290, 341; *Chesapeake & Ohio Fuel Co.* v. *United States*, 115 Fed., 610, 623.)

This, of course, is not to say that intent or purpose has no place in the Act of July 2, 1890. It is material, often decisive, where the answer to the query whether the contract or combination restrains or monopolizes trade or is a "normal and usual contract to further trade" does not conclusively appear from its "inherent nature or effect" but must be determined by all the surrounding circumstances. (*Standard Oil Co.* v. *United States*, 221 U. S., 1, 65, 75; *United States* v. *American Tobacco Co.*, 221 U. S., 106, 179.)

Again, intent is essential in attempts to monopolize. (*Swift & Co.* v. *United States*, 196 U. S., 375.) If the contract or combination is not sufficient of

itself to produce a result which the Act prohibits, it is still to be inquired whether the conscious purpose was to bring such result to pass, for if it was, and the effect of the contract or combination approaches sufficiently near to the unlawful result, such purpose, by producing a dangerous probability that the result will happen, may make the contract or combination unlawful where otherwise it would not be.

> When that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability, as well as against the completed result. (*Swift & Co.* v. *United States*, 196 U. S., 375, 396.)

Where, as in *Anderson* v. *United States* (171 U. S., 578) and *Cincinnati Packet Co.* v. *Bay* (200 U. S., 179), this Court has held that the combination restrained trade, if at all, only incidentally, and was therefore not violative of the Act, the innocent purpose of the parties was considered, not on the theory that it was that which made the restraint only incidental, but on the theory that the combination being not of itself sufficient to produce the prohibited restraint, the innocent purpose excluded also any dangerous probability that such result would ensue. In other words, as stated in *Addyston Pipe Co.* v. *United States* (175 U. S., 211, 234):

> Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is *simply an additional reason* for holding the contract valid and not touched by the act of Congress. [Italics ours.]

But assuming the law to be that an innocent purpose on the part of Reading Company in acquiring the shares of the Central could save the combination from illegality, the complete answer on the facts would still remain, that the innocent purpose is not proved.

Judge Lanning's conclusion that "the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central" rests jointly upon the *finding* that the Baltimore & Ohio Railroad was a prospective purchaser of the shares of the Central and the *assumption* that in case it purchased them it might be expected to abrogate or obstruct the Philadelphia & Reading's traffic agreement with the Central in respect to certain classes of freight bound to and from New York. (*Supra*, p. 300.)

The finding is not supported by the evidence, but if it were true, the assumption based upon it is unwarranted.

There is not a word of competent evidence in the record that the Baltimore & Ohio was a prospective purchaser of the shares of the Central in 1900 or 1901 or at any other time. No officer or agent of the Baltimore & Ohio so testified. No banker who might have been employed to effect such a purchase so testified. No shareholder of the Central so testified. The only testimony on the subject is Mr. Baer's purely hearsay statement that once when he "happened to be in New York" he "was told that the gentlemen who controlled the New Jersey Central were tired of it and that the stock was for sale," and "was also told that the Baltimore & Ohio Railroad had made an offer for this stock, which the

parties had refused because they considered it too small." (5 R., 1185.) He did not even name his informant.

But taking it as proved that the Baltimore & Ohio was a prospective purchaser of the shares of the Central, the assumption that its acquisition of them would have jeopardized the arrangement by which the Philadelphia & Reading has its traffic other than anthracite and bituminous coal move over the tracks of the Central between Bound Brook and Jersey City, is unwarranted for either of two reasons.

First, that arrangement is protected and secured by a perpetual agreement between the Philadelphia & Reading and the Central (4 R., 528, 530), which the Baltimore & Ohio could not break or impair. The later agreement between the same parties and the Baltimore & Ohio (4 R., 530), terminable upon notice, did not take away any right secured to the Philadelphia & Reading by the first, but simply associated the three companies in a through route between Washington and New York.

Secondly, since the road of the Baltimore & Ohio extends no farther north than Philadelphia, from where, to reach New York, it must use the road of the Philadelphia & Reading as far as Bound Brook (4 R., 530), two-thirds of the distance (Map, 3 R., 496), it *must* have maintained harmonious relations with the Philadelphia & Reading at the peril of being shut out of New York, and therefore only by imputing to it blind folly can it be assumed that it would have invited reprisals by interfering with the Philadelphia & Reading's agreement with the Central for the use of its New York terminals. On the other hand, the Philadelphia &

Reading is in an independent position. For anthracite and bituminous coal, its principal articles of traffic, it has its own road all the way to New York Harbor. And for the carriage of its passengers and general merchandise freight from Bound Brook to Jersey City it has a choice of connecting lines, as it intersects at or near Bound Brook with both the Central and the Lehigh Valley, each of which goes into Jersey City. Indeed, as before observed, the Philadelphia & Reading has itself disclaimed that control of the Central is necessary to assure it access to New York. (Ann. Rep., 1893, 2 R., 713.)

Thus, neither Judge Lanning's finding that the Baltimore & Ohio was a prospective purchaser of the shares of the Central nor his assumption that had it purchased them it would have interfered with the Philadelphia & Reading's traffic agreement with the Central—both essential to sustain his conclusion that "the predominating motive in the purchase was to preserve to the Philadelphia & Reading its traffic arrangements with the Central"—has adequate basis.

The proposition that the combining through a holding company of the Philadelphia & Reading and the Central, admittedly competitive roads, is not violative of the Act of Congress because "the predominating motive was to preserve to the Philadelphia & Reading its traffic arrangements with the Central," involves, therefore, both a mistaken conception of law and a mistaken conclusion of fact.

It remains to notice Judge Lanning's concluding observation on this branch of the case (1 R., 457):

> Indeed, the elimination of competition between the Philadelphia & Reading and the

> Central, in the anthracite coal carrying business, was too small a thing to have been an important element in the object of the combination. The proximity of the lines of the Delaware, Lackawanna & Western, the New York, Susquehanna & Western, the New York, Ontario & Western, the Erie, and the Delaware & Hudson to the line of the Central, and of the Pennsylvania's line to the line of the Philadelphia & Reading, left the competitive conditions in the coal-carrying business very slightly affected by the elimination of competition between the Central and the Philadelphia & Reading.

If, as the context would indicate, this suggestion is made simply as confirming the innocent purpose attributed to the combination, it requires no further answer.

It is possible, however, that it is advanced as an independent ground of defense; that it is meant to be argued that, other roads of the same group being left free to compete, "the elimination of competition between the Philadelphia & Reading and the Central, in the anthracite coal-carrying business, was too small a thing to have been an important element in the object of the combination," or to have materially lessened competition in the coal-carrying business, and therefore too small to be within the prohibition of the Act.

Considering that of the freight originating on the Philadelphia & Reading 58 per cent, and on the Central 68 per cent, is anthracite, which contributes to the one 41 per cent and to the other 48 per cent of its total freight revenue, and that the two together transport 33 per cent of the entire ton-

nage moving from the mines (The Facts Established, *supra*, pp. 25,78,79), the destruction of competition between them in the anthracite coal-carrying business was not, we submit, "too small a thing" to have entered into the objects of the combination, and certainly not too small to offend a statute aimed to preserve the competitive system.

Further, the law is "that *every* combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the Act;" "that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight." (*Northern Securities Co.* v. *United States*, 193 U. S., 197, 331, 352.) In the same case Mr. Justice Holmes observed that the Act "hits 'every' contract or combination of the prohibited sort, great or small" (p. 402).

Combining under one control important interstate railroads in substantial competition with each other without more restrains trade within the purview of the Act.

But aside from its legal irrelevancy, the suggestion that the proximity of other roads "left the competitive conditions in the coal-carrying business very slightly affected by the elimination of competition between the Central and the Philadelphia & Reading," is not well founded in fact. It fails to take

account of the economic principle which forces all the roads of a competitive group to meet the rates of any one in all ordinary cases.

As stated by Judge Hook in *United States* v. *Union Pacific R. Co.* (188 Fed., 102, 125):

> A railroad company may have great, if not controlling, influence on competition, regardless of the amount of traffic it actually carries at the time. With a line of railroad scarcely less permanent than a navigable waterway, it stands equipped and ready to do the business when conditions arise, and the duty to do it comes from the very character of its corporate being and the source of its powers and franchises. It may at once be both a curb and a spur to other lines—a curb as regards rates, and a spur as regards quality of service, which are the two great points at which transportation touches the public interest.

Judge Lanning says nothing of the control acquired by this combination over the two largest coal-owning companies, each engaged in interstate commerce, and together owning or controlling 63 per cent of the entire deposits, though that was specifically challenged by the petition and at the hearing, and in the view of the Government is not less a monopolization of trade than the combining of the two competitive railroads.

It should not be left unnoticed that whilst the petition alleges as the gravamen of the combination the—

> uniting and bringing together under a common head and source of control the said Philadelphia and Reading Railway Company and Central Railroad Company of New Jersey, operat-

> ing parallel and competitive lines of railroad, and the said Philadelphia and Reading Coal and Iron Company and Lehigh & Wilkes-Barre Coal Company, controlling * * * 63 per cent of the entire anthracite deposits (1 R., 20, 21);

it does not specifically pray that Reading Company, through which the combination is held together, be enjoined from voting the shares or otherwise controlling Philadelphia & Reading Railway Company, The Philadelphia & Reading Coal & Iron Company, and The Lehigh & Wilkes-Barre Coal Company, but only that it be so enjoined in respect of The Central Railroad Company of New Jersey. It does, however, pray for general relief. (1 R., 28.)

We therefore suggest that if the Court shall find that these competitive railroads and coal trading corporations are held together in an unlawful combination, such unlawful combination should be completely, not partially, dissolved and disarmed of its monopolistic powers. This can only be done by enjoining the holding company from voting the shares or otherwise controlling *either* of the corporations embraced in the combination—the two railroads and the two coal owning and trading companies. Such an injunction may be awarded under the prayer for general relief.

In *Standard Oil Co.* v. *United States* (221 U. S., 1), referring to the matter of relief, this Court said (pp. 77, 78):

> * * * to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: First. To forbid the doing in the future of acts like

> those which we have found to have been done in the past which would be violative of the statute. Second. The exertion of such measure of relief *as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.* [Italics ours.]

And in the *Northern Securities Company's case* the Court did not stop with enjoining the Securities Company from voting the shares of one of the two railroads, but enjoined it from voting the shares of both, thereby completely dissolving the combination.

VI.

THE CONTROL, THROUGH STOCK OWNERSHIP, BY ERIE RAILROAD COMPANY OF THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, A COMPETITIVE INTERSTATE LINE, CONSTITUTES A COMBINATION IN RESTRAINT OF TRADE AND A MONOPOLIZATION THEREOF, IN VIOLATION OF SECTIONS 1 AND 2 OF THE ACT OF JULY 2, 1890.

The petition (paragraph VIIb) charges that in January, 1898, Erie Railroad Company, which operates a railroad from the anthracite fields to tidewater at New York, pursuant to an agreement or combination with its shareholders and with The New York, Susquehanna & Western Railroad Company and the latter's shareholders, "in violation of the aforesaid Act of July 2, 1890," issued and exchanged shares of its capital stock to the par value of $26,000,000 for a majority of those of the New York, Susquehanna & Western, which operates a competitive line from such coal fields to tidewater at New York—

> thereby uniting and bringing together under a common head and source of control the two

> formerly competitive railroad companies and their subsidiary coal companies, with the result of removing all inducement for competition between them and establishing a monopoly of the interstate transportation, particularly the transportation of anthracite coal, formerly carried on by them as competitors, * * *. (1 R., 19, 20.)

It also makes (paragraph VIIb) the separate and distinct charge that—

> irrespective of the aforementioned agreement or combination between the Erie Railroad Company and the New York, Susquehanna & Western Railroad Company and their respective stockholders, the said Erie Railroad Company, in thus issuing additional shares of its capital stock and giving them in exchange for a large majority of the shares of capital stock of its rival and competitor, the said New York, Susquehanna & Western Railroad Company, and thereby acquiring control and mastership of the latter, monopolized the transportation between the several States formerly carried on by the two companies as competitors, and in so doing violated section 2 of the aforesaid Act of July 2, 1890. (1 R., 20.)

The prayer in brief is that Erie Railroad Company be adjudged to have acquired the shares of The New York, Susquehanna & Western Railroad Company in violation of the Act of July 2, 1890, and that it be enjoined from voting or receiving dividends on them; and for general relief. (1 R., 26, 28.)

The answer of the Erie admits that it transports anthracite in interstate commerce and that it has acquired a majority of the shares of the New York, Susquehanna & Western; denies that the two

operate competitive lines; and avers that its purpose was not to suppress competition or promote monopoly but to insure arrangements between the two companies advantageous alike to them and to the public. (1 R., 77, 83, 84.) The answer of the New York, Susquehanna & Western admits that it transports anthracite in interstate commerce, and that a majority of its shares have been acquired by the Erie, but avers that such acquisition was not a transaction of interstate commerce, and that the two are not competitive. (1 R., 87, 89.)

As in the case of the charge respecting Reading Company's acquisition of the shares of the Central Railroad of New Jersey, so also this branch of the case is only discussed in Judge Lanning's concurring opinion.

But although he found that the Erie and the New York, Susquehanna & Western—

> controlled lines which, without doubt, enabled them to compete in the procurement and the transportation of coal (1 R., 446)—

and that—

> each of them did, in fact, transport to New York Harbor coal from the collieries of the Pennsylvania Coal Company and the Hillside Coal and Iron Company (1 R., 445),

the Court decreed (1 R., 467):

> That the charge made in paragraph VIIb of the petition concerning the combination by which it is alleged the Erie Railroad Company acquired the capital stock of the New York, Susquehanna & Western Railroad Company, in violation of the Act * * * approved July 2, 1890, is not sustained, and the petition in respect of that charge is dismissed.

In so doing the Court erred, the Government contends. (Assignment of Errors, V, 1 R., 471.)

The evidence shows that at a stockholders' meeting of the Erie, held March 11, 1898, it was decided to propose to the shareholders of the New York, Susquehanna & Western that they exchange their shares for shares in the Erie "upon the terms and conditions agreed upon or to be agreed upon between the Erie Railroad Company and the New York, Susquehanna & Western Railroad Company" (Govt. Ex. No. 153, 3 R., 319; Bosman, 2 R., 487); that the proposal was made (Govt. Ex. No. 154, 3 R., 322; Bosman, 2 R., 487), and that pursuant thereto shareholders of the New York, Susquehanna & Western exchanged their shares in that company for shares in the Erie until on June 30, 1898, the latter had acquired 122,463 shares of the common and 128,440 shares of the preferred stock of the former, out of a total issue of 130,000 shares of each kind (Bosman, 2 R., 488), thus bringing the two railroads and their respective subsidiary coal companies, Hillside Coal & Iron Company and The New York, Susquehanna & Western Coal Company, under one control. (The Facts Established, *supra*, pp. 91–92.)

The two railroads now have the same executive officers and all but two of the thirteen directors of one are also directors of the other. Likewise, the two coal companies have the same executive officers and majority directors in common. (The Facts Established, *supra*, p. 92.)

(A) The Erie Railroad and the New York, Susquehanna & Western Railroad are substantially competitive interstate lines.

Both the Erie Railroad and the New York, Susquehanna & Western Railroad, since prior to 1898, have operated lines from the same general territory in the anthracite regions to Weehawken and Edgewater, respectively, on New York Harbor. (The Facts Established, *supra*, pp. 86–90; Cumming, 2 R., 359, 360; Richardson, 2 R., 129, 144; Thomas, 5 R., 1116; Map, Govt. Ex. No. 13, 3 R.)

Anthracite is the Erie's principal article of freight, contributing nearly one-fourth of its total freight traffic and a revenue in 1907 of $10,566,307.86 out of a total from freight of $34,580,865.80. It contributes two-thirds of the freight tonnage and freight revenue of the New York, Susquehanna & Western, which was constructed expressly for the purpose of transporting it. (3 R., 168; The Facts Established, *supra*, p. 88.)

Together, the two transported, in 1907, 10.66 per cent of the total shipments from the mines. (Ibid., *supra*, p. 25.)

In Proposition II of the Argument (*supra*, pp. 160–170) it was established, we think, that railroads so situated, being in position powerfully and immediately to influence each other's traffic and rates, are naturally competitive.

It has also been shown that the New York, Susquehanna & Western system, as it existed in 1898, when the Erie acquired control, had been built expressly for the purpose of transporting anthracite from the mines to tidewater in competition with the existing roads, among these the Erie; that in 1897

anthracite contributed 72.8 per cent of the total freight receipts of the New York, Susquehanna & Western; that while still incomplete and dependent upon connecting lines its competition reduced the proportion of the tidewater selling price taken by the railroads for freight tolls from 55 to 50 per cent; and that only the year before its acquisition by the Erie it had completed a final connecting link in the coal regions which put it, as announced to its stockholders, "in an independent position in respect to the transportation of coal." (The Facts Established, *supra*, pp. 87, 88.)

Further, it has been shown that since 1897 the two roads have also been competitive in the narrower sense that the *same* freight might move to its destination over either, it appearing conclusively that the New York, Susquehanna & Western, at any time since that year, might have transported to tidewater and other markets en route coal from the collieries of The Delaware & Hudson Company and The Pennsylvania Coal Company, two of the three sources of the Erie's anthracite traffic, and also from some of the collieries of Hillside Coal & Iron Company, the third and remaining source. (Ibid., *supra*, pp. 88–90.)

Finally, the member of the Circuit Court who specially discussed this branch of the case, while holding for the railroads on the ground that the purpose of the combination was not to suppress competition, rejected their defense that they were not competitive and found that—

> Though the Erie and the Susquehanna were free to extend their lines and thereby increase their business as common carriers of anthra-

> cite coal, it is clear that the more the business was thus increased the greater were the opportunities for competition between them. Each of them did, in fact, transport to New York harbor coal from the collieries of the Pennsylvania Coal Company and the Hillside Coal and Iron Company. After the Susquehanna had put itself "in an independent position with respect to the transportation of coal," [1897] it and the Erie controlled lines which, without doubt, enabled them to compete in the procurement and the transportation of coal. (Opinion of Lanning, J., 1 R., 445.)

Another member of the Court found that—

> These six defendant railroads * * * are in keen competition with each other not only in transporting, but in buying coal to originate freights and in selling it to realize profits. (Opinion of Buffington, J., 1 R., 426.)

(B) It being thus established that the Erie and the New York, Susquehanna & Western are substantially competitive interstate lines, the acquisition and continued holding by the former of a majority of the shares of the latter violates the Act of July 2, 1890.

This proposition requires no separate discussion, being in substance identical with that heretofore maintained in respect of Reading Company's purchase of the shares of the Central Railroad of New Jersey. (The Argument, V, *supra*, pp. 275–312.)

The one difference between the two cases—one of form—is that here, instead of a third corporation taking the stock of the two railroads, one took the stock of the other. But if it is a violation of the Act for a third corporation to acquire a majority of the shares of two competitive railroads, *a fortiori*, it must

be so for one such railroad itself to acquire a majority of the shares of the other. For suppression of competition between independent railroads is the evil struck at, and the lodging of a majority interest in the stock of one of two competitive roads immediately in the other would, if anything, more directly and certainly suppress competition between them than if a third corporation held majority interests in both.

As stated by Judge Hook in *United States* v. *Union Pacific R. Co.* (188 Fed., 102, 120):

> There is no substantial difference between the holding of the corporate stocks of two companies by a third, such as was condemned in the Northern Securities case (193 U. S., 197), and the holding by one of those two of the stock of the other. * * * In *Harriman* v. *Northern Securities Co.* (197 U. S., 244, 297), it was assumed that the Act could be violated by the direct holding of stock of a competing corporation.

The illegality of this transaction is aggravated by the fact that not only were two competitive railroads thereby brought under one control, but also two coal companies, producing, buying, and selling anthracite in interstate commerce in competition—the Erie Railroad owning the entire capital stock of Hillside Coal & Iron Company, and the New York, Susquehanna & Western Railroad owning a majority of that of The New York, Susquehanna & Western Coal Company. (The Facts Established, *supra*, p. 91.)

With the exception of Judge Gray's statement of his conclusion that this transaction was neither intended nor had the effect to restrain interstate com-

merce (1 R., 422), Judge Lanning alone discusses the charge of the petition respecting it.

As seen, so far from accepting the defense that the Erie and the New York, Susquehanna & Western were not competitive lines, he expressly found that they were (*supra*, pp. 317–318); but held that, nevertheless, the acquisition by the one of the shares of the other was not a violation of the Act, because it was not the *purpose* in forming the combination to suppress competition, and that if such was the result it was but an incidental, not the designed or principal, result. (1 R., 447.)

On exactly the same ground Judge Lanning held that the combination of the Philadelphia & Reading Railway and the Central Railroad of New Jersey, competitive lines, was not a violation of the Act. In discussing that branch of the case we attempted to show the error of this contention. (The Argument, V, *supra*, pp. 299–309.)

But if the purpose of the combination were material, its effect being what it is, the grounds relied upon by Judge Lanning to show that this was not to suppress competition are unconvincing. (1 R., 446–447.)

First, he says—

> that in 1898 the Susquehanna had larger terminal facilities at Edgewater, New Jersey, than it required at that point; that the terminal at Weehawken, about five miles south of Edgewater, was not an adequate one at that point for Erie's great and growing business; that the terminal facilities of the Susquehanna's freight business, exclusive of coal, in Jersey City and New York, were restricted to small

> quarters in the terminals of the Pennsylvania Railroad Company; that the acquisition of the Susquehanna by the Erie enabled the Susquehanna to take its general freight business from the Pennsylvania's terminals to those of the Erie in New York; and that by the acquisition the convenience of both the Erie and the Susquehanna was promoted and the interests of the public subserved. (1 R., 446.)

But, supposing all these things to have entered into the objects of the combination, that would not exclude as a further object suppression of competition between the two roads in the transportation of coal. It can not escape notice, however, that acquiring at great cost control of an entire railroad system extending into three States was not the natural and normal way for the Erie to enlarge its terminal facilities on New York Harbor. And as for the suggestion that it was part of the object to provide for the general freight traffic of the New York, Susquehanna & Western larger terminal accommodations than those it had under its agreement with the Pennsylvania Railroad, the evidence shows that the former had then recently completed new and commodious terminals at Edgewater, where not only coal, but all classes of freight were being handled (Johns, 4 R., 48, 53), and on equal terms, too, with Jersey City and Weehawken, after 1897, when Edgewater was brought within the established lighterage limits of New York Harbor. (Smith, 4 R., 224, 247, 248.)

Again he states that—

> so many other roads reached into the anthracite fields of Pennsylvania and transported coal to New York Harbor that the elimination of competition between the Erie and the Sus-

> quehanna in the anthracite coal business could have had no substantial effect upon the business or upon the price of coal at New York Harbor. (1 R., 447.)

This theory ignores the economic law which forces all the roads of a competitive group to meet the rates of any one within ordinary limits. It is a proved *fact* here, moreover, that while still incomplete and dependent upon connecting lines, the competition of the New York, Susquehanna & Western reduced the proportion of the tidewater selling price taken by the railroads for freight tolls from 55 to 50 per cent (Sturges, 2 R., 281, 282; Richmond, 2 R., 268, 274; Cumming, 2 R., 359, 378); and its competition was certainly not less potential after it completed in 1897 the final link which placed it "in an independent position in respect to the transportation of coal." (2 R., 737.)

He next observes:

> That suppression of competition was not the principal purpose of the combination seems to be shown by the lease of the Susquehanna to the Erie of February 24, 1898, which declared that the closer connection between the two roads thereby proposed would be for the public benefit, as well as for their mutual advantage, and by the Act of the Legislature of New Jersey of April 2, 1898, by which consent to the proposed combination was given on condition that "neither of the said railroad companies shall increase the present rate or rates of the freight or passenger traffic of the said companies in this State." (1 R., 447.)

But a self-serving declaration of intention by those forming a combination, if not wholly incom-

petent, is at least not trustworthy evidence of the real intention and can not overcome the presumption that the parties intended the natural and probable consequences of their acts. As for the suggestion that the Act of New Jersey consenting to the lease of the Susquehanna by the Erie shows that the purpose of the combination was not to suppress competition, the condition on which the consent was granted—that "neither of the said railroad companies shall increase the present rate or rates * * * of the said companies in this State"—shows on the contrary that the Legislature saw that combining the two roads would suppress competition between them and inserted this provision to prevent an increase of rates when the check of competition was gone.

Finally, he says that whatever competition between the Erie and the Susquehanna was eliminated by the combination—

> was so inconsiderable a thing that it did not enter into the objects. (1 R., 447.)

But the evidence shows (The Facts Established, *supra*, pp. 88–90), and Judge Lanning found (1 R., 445–46), that since 1897 the New York, Susquehanna & Western has been in position to transport to tidewater and other markets coal from the collieries of The Delaware & Hudson Company and The Pennsylvania Coal Company, two of the three sources of the Erie's anthracite traffic, and also from some of the collieries of Hillside Coal & Iron Company, the third and remaining source. And since anthracite is of the first importance to the Erie as freight—in 1907 it constituted nearly one-fourth of

its total freight traffic and contributed a revenue of $10,566,307.86 (Govt. Ex. No. 78, 3 R., 168)—the competition of the New York, Susquehanna & Western for that tonnage was not, we submit, too "inconsiderable a thing" to have entered into the objects of the Erie. Again, in 1901, when a competitive road to the Hudson River was projected which might have taken from the Erie the tonnage of The Pennsylvania Coal Company's mines, the former, already burdened with debt, issued additional bonds for $32,000,000 and $5,000,000 additional stock to acquire the shares of the Pennsylvania company for the admitted purpose of preventing a diversion of this tonnage to the new road. (The Facts Established, *supra*, pp. 112–114; Thomas, 5 R., 1085, 1120.) Obviously, in the view of the Erie even threatened competition for the tonnage from the Pennsylvania company's mines *alone* by a road *not yet built* was not "so inconsiderable a thing."

It only remains to answer two or three minor arguments of counsel on this branch of the case.

It was said in effect that the New York, Susquehanna & Western was a puny little railroad, too weak a competitor for its absorption by the Erie to offend the Act of Congress.

It has been shown that the New York, Susquehanna & Western was in position to affect the Erie seriously by its competition. But be this as it may, if the law is that naturally and subtantially competitive railroads may not be combined, it is not within the discretion of the courts to make its application depend upon the strength or size of the roads; it must apply to all alike.

Again, the New York, Susquehanna & Western only completed its line to the coal fields the year before

its acquisition by the Erie, and therefore had not had time to show its strength as a competitor. If an existing road which has acquired control of a projected competitive line or one only just completed can be heard to say that the competition suppressed was as yet of little consequence, the way is open for existing roads to prevent the entrance into their field of any additional competitive lines.

It was also said that if the great Pennsylvania Railroad, with its rate of $1.40 per ton from the mines to tidewater as compared with $1.55 charged by the Erie and others, had not been able to take tonnage from the latter, surely the New York, Susquehanna & Western could not be thought of as a competitive line. The ready answer is that the rate of $1.40 is applicable only to mines located directly on the Pennsylvania Railroad. Where the coal comes to the latter from a mine located on another road its rate to tidewater is $1.55, the same as on the other roads. (Searles, 2 R., 248–250.) Further, with nearly all the coal mined on each road controlled by it through contracts or combinations, no road, while that condition prevailed, could secure tonnage by offering a lower rate.

Counsel also introduced in evidence an Act of New Jersey of April 2, 1898, giving consent to The New York, Susquehanna & Western Railroad Company, with the approval of the holders of two-thirds of its capital stock, "to lease its franchises, railroad, and property to the Erie Railroad Company" or "to unite, consolidate, or merge the whole or any part of its stock, property, franchises, or railroad with that of the Erie Railroad Company." (5 R., 1156; N. J. Laws, 1898, pp. 236, 237.) If the claim is that this

Act can be construed as authorizing the Erie's acquisition of the shares of the Susquehanna, it is sufficient comment that in a late proceeding before the New Jersey Board of Public Utility Commissioners these roads made it appear "that advantage has not been taken of the provisions of the statute to unite, consolidate, or merge the property or franchises of the New York, Susquehanna & Western Railroad Company with that of the Erie Railroad Company." (See opinion, Public Utility Comrs., N. J., Oct. 4, 1910.) Further, the Erie was already the owner of more than two-thirds of the shares of the Susquehanna when this New Jersey Act was passed. (Bosman, 5 R., 1157.)

Again, The New York, Susquehanna & Western Railroad Company is a corporation of both Pennsylvania and New Jersey (2 R., 636; 6 R., 13, 14), and Wilkes-Barre & Eastern Railroad Company, the vital link of the New York, Susquehanna & Western system between Stroudsburg and the coal fields, is exclusively a corporation of Pennsylvania, whose Constitution, Article XVII, Section 4, provides:

> No railroad, canal, or other corporation, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning or having under its control a parallel or competing line.

Furthermore, the Act of Congress is paramount here. (*Northern Securities Co.* v. *United States*, 193 U. S., 197.)

In conclusion, we emphasize that to appreciate the full import of the acquisition of the New York, Susquehanna & Western by the Erie it must be viewed in connection with the defeat of other attempts to loosen the hold of the anthracite monopoly by constructing a new railroad to the mines.

In recent years four new railroads from the anthracite regions to tidewater, or to points of connection with other railroads reaching tidewater, have been seriously proposed—the New York, Susquehanna & Western, the New York, Ontario & Western, the New York, Wyoming & Western, and the Delaware Valley & Kingston. The first, as just seen, had barely time to announce to its stockholders in 1897 the completion of a link which placed it "in an independent position in respect to the transportation of coal" before the defendant Erie Railroad Company absorbed it. Of the other three, the New York, Wyoming & Western and the Delaware Valley & Kingston were defeated in their inception, the former by the defendant railroads in combination and the latter by defendant Erie Railroad Company acting in pursuance of the object of said combination and through the same firm of bankers who were the allies of all in defeating the New York, Wyoming & Western. (The Facts Established, *supra*, pp. 92–114.)

The New York, Ontario & Western is controlled by the New York, New Haven & Hartford Railroad (Govt. Ex. No. 112, 3 R., 197), which may explain why it has not shared the fate of the others.

VII.

THE COMBINATION OF DEFENDANT RAILROADS AND AFFILIATED COAL COMPANIES IN THE TEMPLE IRON COMPANY, WITH THE PURPOSE AND EFFECT OF FORESTALLING THE CONSTRUCTION OF A PROJECTED COMPETITIVE LINE AND PERMANENTLY SHUTTING OUT COMPETITION AMONGST SUCH RAILROADS, AND ALSO AMONGST THEIR COAL COMPANIES, RESTRAINS AND MONOPOLIZES TRADE AND COMMERCE AMONG THE STATES, IN VIOLATION OF SECTIONS 1 AND 2 OF THE ACT OF JULY 2, 1890.

The union of defendant railroads and affiliated coal companies in The Temple Iron Company has been considered as proof of the General Combination to control and monopolize the anthracite trade alleged in paragraph VII of the petition. (The Argument, III, *supra*, pp. 177–188.) We are now to consider it as a combination of narrower scope in itself unlawful, that is, one for the purpose of defeating a projected competitive railroad, pooling the tonnage from specific mines, and suppressing competition amongst its members in the sale of anthracite.

The petition (paragraph VIId) charges that in 1898 a large number of independent operators in the Wyoming and Lehigh regions, chief among them Simpson and Watkins, a firm owning eight collieries with an annual output near 1,500,000 tons, projected a new railroad from the mines to tidewater, which would have introduced competition into the transportation of anthracite and permitted the independent output to be sold in the markets in competition with that of the railroad coal companies; that to this end the said operators organized the New York, Wyoming & Western Railroad, which had secured pledges of tonnage, had surveys of its proposed line made, and purchased several thousand tons of rails, when the

defendants Reading Company (alter ego of Philadelphia & Reading Railway Company), The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, conspiring to defeat the project and prevent the competition it would introduce and to pool amongst themselves the tonnage moving from the said collieries of Simpson and Watkins, purchased or agreed to purchase in stated proportions the capital stock of The Temple Iron Company, an old holding corporation brought forth for the occasion, and caused it to acquire these collieries with its securities issued especially for the purpose and guaranteed by the above-named defendants; that thereupon, weakened by the loss of these supporters, this attempt to construct the proposed independent railroad failed. (1 R., 21–23.)

Special and general relief are prayed. (1 R., 27, 28.)

The answers admit the acquisition of the shares of The Temple Iron Company by the defendants named in the proportions alleged, and also the contemporaneous acquisition by the former of the shares of the coal owning and producing companies controlled by Simpson and Watkins; but deny that the purpose was to defeat a projected competitive line or to pool tonnage. (1 R., 48, 49, 61, 65, 72, 84, 85, 86, 90, 126–130.)

Judge Buffington thus stated the conclusion of himself and Judge Gray (1 R., 438, 439):

> It appears, then, by the proofs:
>
> First. That the construction into the anthracite region of an additional com-

petitive carrier of interstate commerce, the New York, Wyoming & Western Railroad, was threatened and feared.

Second. That the product of Simpson & Watkins's eight collieries entered largely into interstate commerce, and the diversion of this product and other interstate commerce was promised to and threatened to be divided by such new road.

Third. That the six defendant railroads combined to prevent the building of the competitive road, and the possible diversion of interstate commerce, by the reorganization of the Temple Iron Company and the joint ownership of its stock, by purchasing through such company the stock of the Simpson & Watkins collieries, detaching such collieries from the support of the proposed road, thereby causing its abandonment, and later removing the interstate product of such collieries for all time from the field of interstate freight competition, as they did in some cases when the perpetual 65 per cent contracts were later agreed upon.

To us it is therefore clear that the combination of these six defendant railroads in the Temple Iron Company was a combination "in restraint of trade or commerce among the several States," and falls within the prohibition of the statute.

Judge Gray said (1 R., 423):

It seems to me clear that an agreement was come to by the defendants named which resulted in concerted action for the avowed purpose of bringing about an abandonment of the project of a route from the Wyoming coal field in the State of Pennsylvania for the carriage of coal to

tidewater in the State of New York. This avowed and conceded purpose rendered all that was done in pursuance thereof violative of the act of Congress in question, however innocent and legitimate it might have otherwise been. * * * The Temple Iron Company was the palpable instrument or means by which the unlawful purpose of the combination was accomplished, and its acquirement of the said collieries in pursuance of that combination must be held as illegal.

It was accordingly adjudged and decreed (1 R., 466):

First. That the defendants [Reading Company and the railroads], prior to the time the petition was filed, entered into, and at the time and since the filing of the said petition were and have been joined together in, a combination in restraint of trade and commerce among the several states, by and through the instrumentality of the defendant, The Temple Iron Company, in violation of the Act of Congress, approved July 2, 1890, * * *; that the shares of the capital stock of The Temple Iron Company, claimed to be owned and held by or in the interest of each of the above-named defendants, were acquired and are now held by it or in its interest in pursuance and furtherance of such unlawful combination; and that the shares of capital stock of the Northwest Coal Company, Edgerton Coal Company, Sterrick Creek Coal Company, Babylon Coal Company, Mount Lookout Coal Company, Forty Fort Coal Company, and Lackawanna Coal Company, Limited, likewise were acquired and are now held in violation of said Act of Congress by the defendant, The Temple Iron Company.

Defendants maintain that this adjudication is entirely erroneous (1 R., 498, 506); the Government, that whilst correct as far as it goes, it did not go far enough. (Assignment of Errors XII, XIII, XV, 1 R., 472, 473.)

The evidence establishes that in 1899 the defendants Reading Company (alter ego of Philadelphia & Reading Railway Company), The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company, contracted, in combination with each other, to purchase, respectively, 29.96 per cent, 17.12 per cent, 22.88 per cent, 19.52 per cent, 5.84 per cent, and 4.68 per cent—in all, 100 per cent—of the capital stock of The Temple Iron Company, which, thereupon, at the direction and with the credit of its railroad stockholders, acquired from Simpson and Watkins the shares of seven independent coal-mining companies operating eight collieries, with an annual production then in excess of 1,300,000 tons. (The Facts Established, *supra*, pp. 94–97.)

It is also established that shortly before this—in 1898—a number of independent operators, among them Simpson and Watkins, having long protested unavailingly against what they thought extortionate and discriminatory freight rates, had united in support of a projected competitive railroad route from the coal fields to tidewater. (*Ibid.*, *supra*, pp. 93–94.) To this end they incorporated the New York, Wyoming & Western Railroad, subscribed to its stock, secured pledges of tonnage, and made other preparations. (*Ibid.*, *supra*, pp. 93, 94.)

The time was auspicious, for in the following year an independent tonnage of between eight and nine millions theretofore bound by contracts to the existing roads or their coal companies would become free by the contracts expiring. (*Ibid., supra*, p. 93.)

> The proofs show that in the early part of 1899 from eight to nine millions of operators' tonnage, which had been tied up on seven-year contracts with the subsidiary companies at 60 per cent, would expire. (Opinion of Buffington, J., 1 R., 429.)

Admittedly, if built, this road would have been a competitor of defendants. (Thomas, 5 R., 1090, 1091.) Also, it would have made it possible for the independent output, theretofore at the mercy of railroads themselves in the coal business, to be sold in the markets in competition with that of the railroad coal companies.

Judge Buffington, with whom Judge Gray concurred on this branch of the case, found (1 R., 430):

> These and other proofs that might be cited make it clear that the New York, Wyoming & Western Railroad Company threatened competition in the antracite interstate trade in buying, carrying, and selling coal, and that which follows shows that such competition was defeated by a combination of the defendant railroads, which combination used the Temple Iron Company, a Pennsylvania corporation, as its instrument to preclude competition.

When the defendants, acting in combination through The Temple Iron Company, acquired from Simpson and Watkins the shares of the seven independent coal-mining companies, the support of

these was lost to the projected road, and in consequence it collapsed for the time being. (The Facts Established, *supra*, p. 98; opinion of Buffington, J., 1 R., 431–35.)

(1) That one purpose of defendants in thus combining through The Temple Iron Company and acquiring these collieries was to defeat, as they did, the projected competitive railroad, by detaching from it a principal source of tonnage, is shown beyond question by the testimony of their own officers and of the vice president of the New York, Ontario & Western Railway set out in the statement of facts. (The Facts Established, *supra*, pp. 98–101.)

It was so found, too, by both Judges Gray and Buffington. (Opinions, 1 R., 423, 435.)

The purpose of defendant railroads is also revealed in the principle on which they divided the stock of The Temple Iron Company and guaranteed its securities. The percentage allotted to each (Reading Company standing for Philadelphia & Reading Railway) *was the average ratio of its own anthracite tonnage to the aggregate tonnage of all six in the five preceding years, 1894 to 1898.* (The Facts Established, *supra*, p. 103.) A movement on foot threatened the monopoly of the confederates. Having decided upon a plan of attack, how should the burden be distributed? Naturally, in proportion to the interest of each; in the ratio that the tonnage of each bore to that of all.

A combination with such purpose and effect clearly violates the Act of Congress.

> Neither the letter of the statute nor its purpose distinguishes between strangling a commerce which has been born and preventing the

birth of a commerce which does not exist. (*United States* v. *Patterson*, 59 Fed., 280.)

Under its prohibitions—

> It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. (*Thomsen* v. *Union Castle Mail S. S. Co.*, 166 Fed., 251, 253.)

In *Interstate Commerce Commission* v. *Baird et al.* (123 Fed., 969) Judge Lacombe, referring to the very transaction now in question, said (p. 972):

> The defendants, being unwilling to meet the competition which such a new road would introduce, combined together, and bought up the collieries of those who were promoting the new road. Thereupon the project of building such competing road was abandoned.

And in the same case on appeal this Court thus referred to it (194 U. S., 25, 46):

> It appears that in 1899 certain operators in the anthracite coal region organized a competing railroad, with a view to carrying their product from the coal regions to market at tidewater. It became evident that this company was likely to succeed and to construct a competing railroad from the coal fields to the sea. With a view to acquiring its property, five of the leading railroad carriers purchased the collieries whose proprietors were developing the new scheme. To pay for these, the charter of the Temple Iron Company was purchased and its capital stock increased. * * * This ended the building of an independent line, and the transportation of coal from the collieries is distributed among the carriers interested.

In *United States* v. *Union Pacific R. Co.* (118 Fed., 102), it was said (p. 117):

> * * * That a contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway which, if constructed, would naturally and substantially compete with an existing line for interstate traffic would be in violation of the antitrust law, may well be conceded.

In *Pennsylvania R. Co.* v. *Commonwealth* (7 Atl., 368, 372), the Supreme Court of Pennsylvania said (p. 372):

> The purpose undoubtedly was to promote competition in railroad traffic. But if a corporation engaged in constructing a competitive road may be controlled by its rival until the road is completed, it would be entirely within the power of the rival to determine whether that event should ever happen; * * * .

In *Hartford & New Haven R. Co.* v. *New York & New Haven R. Co.* (3 Robt. (N. Y.), 411, 415) an agreement between plantiff and defendant an object of which was to defeat the construction of a projected railroad that would have been a competitor of plantiff was held contrary to public policy and void.

The presidents of defendant railroads and railroad coal companies constitute the directory of The Temple Iron Company, whilst its executive committee, vested with all the powers of the directory, is composed of the superintendents of the railroad coal companies. (The Facts Established, *supra*, pp. 106, 107.)

Both railroads and their affiliated coal companies are thus associated in this organization. If, there-

fore, it be an unlawful combination, as held, the Court below erred in refusing to adjudge the latter equally with the former parties thereto.

It is contended that the proposed road was but a paper one, also impracticable, and would never have been built; and that in any event there is a variance, the petition alleging that it was to extend to tidewater and the proof showing that it was projected only to the Delaware River.

That six important railroad systems should have combined forces and enlisted powerful banking support in an attempt to defeat the projected road is the strongest possible evidence that it was proposed in earnest with good prospect of success. President Thomas admitted as much (5 R., 1090, 1091). So, too, Judge Buffington found (1 R., 430):

> But it is evident not only from what the defendant railroads actually did to prevent its construction, but from what they themselves say, that it was a possibly strong competitive factor to tidewater, the elimination of which was necessary to preserve a noncompetitive status among these defendant railroads, the lines of several of which might be used as a connecting line to tidewater from the terminus of the projected road.

But assuming that its proponents did not intend or would not have been able to complete the proposed route, the fact remains that defendants took it seriously and combined to thwart it. That is enough, as Judge Gray says. (1 R., 423.)

As for the alleged variance, it is true the petition avers that the plan contemplated a railroad from the coal region to tidewater, whilst the proof shows there

has been authorized only a railroad from that region to a point on the Delaware River opposite or near Belvidere, New Jersey, where it could connect with the lines to tidewater of either the Delaware, Lackawanna & Western, the Central of New Jersey, the Lehigh Valley, or the Pennsylvania. (The Facts Established, *supra*, p. 93.) This difference, we submit, is unimportant. A majority of the Circuit Court dismissed it. (1 R., 423, 430.)

It is further contended that the unlawful combination no longer exists; that with the defeat of the proposed New York, Wyoming & Western Railroad its whole purpose was accomplished and thereafter it was *functus officio*.

Defendants might have abandoned their combination after its initial success. But they did not.

On the contrary, as adjudged by the Circuit Court, they have continued it without change of form. They have remained united in The Temple Iron Company. Their officers continue to meet together ostensibly as its board of directors and executive committee. They have remained in joint control of the collieries whose detachment from the proposed road defeated its construction and the restoration of which to an independent status might revive it.

Why they have pursued this course we need not inquire. Doubtless, however, because they believed that only by continuing their combination could they be assured of enforcing its object. For *non constat* that if they dissolved it—withdrew from The Temple Iron Company and released their control of the Simpson and Watkins collieries—these might not return to the support of the proposed road, thereby reviving it.

This, therefore, is a case of continuous cooperation to bring to pass the thwarting of a projected competitive railroad, not only for to-day, but continuously, indefinitely.

> When the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. (*United States* v. *Kissel*, 218 U. S., 601, 607.)

Finally, it is said that the Court was without power to enjoin The Temple Iron Company from voting the shares of the seven formerly independent mining companies acquired in pursuance of the conspiracy, since such companies—at least five of them—are not parties to the bill. (Opinion of Lanning, J., 1 R., 453.)

But the injunction operates only upon The Temple Iron Company. The seven others are neither enjoined to do or not to do anything, nor is there any judgment whatever against them.

In *Minnesota* v. *Northern Securities Co.* (184 U. S., 199), a suit to enjoin the defendant from voting the majority shares of two railroads, this Court held that the latter were necessary parties. But there the reasoning was that the minority shareholders of the railroads, as also the public interest in them as highways, would not be represented if the railroads were not parties—a consideration wholly without force here, where The Temple Iron Company is the *sole* shareholder of the corporations whose

shares it is enjoined from voting and where the public has no special interest at stake.

(2) A second intended result of this combination is permanently to prevent competition amongst the railroad stockholders of The Temple Iron Company for the tonnage from the eight collieries acquired from Simpson and Watkins.

As shown, the Central of New Jersey, the Lehigh Valley, the Delaware, Lackawanna & Western, the Erie, and the New York, Susquehanna & Western are naturally competitors for the tonnage moving from these collieries. While the Philadelphia & Reading does not reach the region in which they are located, it can serve them in conjunction with connecting lines. (The Facts Established, *supra*, p. 104.)

This output—2,053,824 tons in 1907—has always moved in interstate commerce. Prior to 1892, when they began selling all their coal to the railroad coal companies, Simpson and Watkins shipped part of it themselves to the principal markets—New York, Oswego, Buffalo—where their chief competitors were the railroad coal companies; and since then, as before, the coal from these collieries in large part has been habitually transported in interstate commerce. New York Harbor has always been its principal market. (*Ibid.*, *supra*, pp. 105, 106; Opinion of Buffington, J., 1 R., 437, 438.)

For several railroads to organize or acquire a separate corporation, divide its capital stock amongst them in agreed proportions, and procure for it with their own credit ownership of a body of traffic for which they are competitors or may be if they choose, is not only a pooling combination but one of a most insidious and durable kind.

Referring to this very Temple Iron Company, to determine if it were relevant to prove its organization and operations before the Interstate Commerce Commission on a complaint that the anthracite railroads owning its stock were maintaining a pool of freight in violation of Section 5 of the Act to Regulate Commerce, this Court said in *Interstate Commerce Commission* v. *Baird* (194 U. S., 25, 47):

> There is a division of freight among several railroads, where, by agreement or otherwise, the companies have a common interest in the source from which it is obtained.

It was, indeed, a declared purpose of these railroads in acquiring the shares of The Temple Iron Company to assure to themselves, against the competition of each other or of any new road, the tonnage from its mines in the same proportions that they had theretofore transported it (The Facts Established, *supra*, pp. 98–101); and to make that distribution still more secure the several roads caused said company to contract to sell to the coal department or subsidiary of each the entire production for all time of the particular mines whose output it was at that time transporting. (*Ibid.*, *supra*, p. 101.)

If defendant railroads may thus apportion amongst them in perpetuity the transportation of 2,000,000 tons of the anthracite output, why may they not in like manner apportion it all?

In contradiction of Presidents Thomas and Walter (*ibid.*, pp. 98–100), it is suggested that the railroad stockholders of The Temple Iron Company were not competitors for the tonnage moving from its mines, because much of the land on which these are located was held by The Temple Iron Company or

its subsidiaries under leases from the coal companies of these same railroads, stipulating that the coal taken out should be shipped over the particular railroad whose coal company made the lease; and because further, most of the coal produced in these mines was then purchased at the breaker under 60 per cent contracts by the coal companies of the railroads over which, respectively, it was shipped.

As to the effect of the 60 per cent contracts, it is enough to say that they were expiring by limitation in 1899. (The Facts Established, *supra*, p. 62; Simpson, 2 R., 440; Law, 2 R., 325, 326.)

As to the distribution of this tonnage amongst the railroads being fixed by covenants in the leases under which the coal is mined, it is to be observed: First, that without the entire leases, which were not produced, these particular covenants prove nothing, since for all we know the leases contain other provisions that put these in an entirely different light; for example, a provision that, should any other road offer a lower rate which the lessor road did not meet, the covenants would not be binding. Second, the admissions of Presidents Thomas and Walter (The Facts Established, *supra*, pp. 98–100), and the drastic action taken by the roads to assure the distribution of this tonnage in the proportions then prevailing, conclusively prove that it could not have been already securely bound to them in those proportions. Third, it is not claimed, in any event, that all the coal-bearing lands controlled by The Temple Iron Company were covered by such covenants.

But, going deeper, the answer to the whole contention is that railroads in a position to compete for a body of tonnage do not cease to be at least potential

competitors merely because one has a contract for the transportation of the tonnage. And if they are potentially competitive that is enough. (*United States* v. *Standard Oil Co.*, 173 Fed., 177, 187; aff., 221 U. S., 1.) The contract may expire, it may be canceled by agreement, it may be void, it may be broken; in a variety of ways the tonnage might become free.

(3) Through The Temple Iron Company competition is eliminated amongst the defendant railroad coal companies in the production and sale of anthracite, and between them and the seven formerly independent mining companies acquired from Simpson and Watkins. This aspect of the company has been sufficiently discussed. (The Argument, III, *supra*, pp. 177–188.)

(4) After The Temple Iron Company acquired from Simpson and Watkins the seven independent mining companies operating eight collieries, its railroad stockholders caused it, or the companies so acquired, to make (in place of short term ones) contracts in the 65 per cent form selling their output *in perpetuity* to the coal department or subsidiary company of one or another of defendant railroads. (The Facts Established, *supra*, p. 101.)

These contracts—seven in number—are enumerated and described in the statement of facts. (The Facts Established, *supra*, pp. 101–102; also Law, 2 R., 328, 335, 498; Ans., The Temple Iron Co., 1 R., 129; Ans., Lackawanna Coal Co., Ltd., 1 R., 289, 290, 291, 297; Ans., Mount Lookout Coal Co., 1 R., 223.)

As intended, they clinched the objects of the combination: First, by making it impossible that the large

and growing tonnage of these mines could ever be a source of support either to the new road then being promoted or any other; second, by effecting a permanent apportionment of this tonnage amongst the existing roads in the same proportions in which they had theretofore transported it, thereby closing the door to competition amongst them.

These contracts, therefore, are unlawful as acts directly in pursuance of the unlawful combination denounced by the Circuit Court (see opinion of Buffington, J., 1 R., 441), as well as on grounds common to all the 65 per cent contracts; and it was error, we maintain, not so to decree.

We submit that the decree of the Circuit Court on this branch of the case should be affirmed, with these modifications:

(*a*) The railroad coal companies equally with the railroads should be adjudged parties to the combination and each member thereof *specifically* prohibited from receiving any transfer of the collieries or business of the companies acquired by The Temple Iron Company in pursuance of the combination, since if such transfers were permitted said collieries could be divided up amongst the defendants and the objects of the combination attained.

(*b*) The 65 per cent contracts above set forth between The Temple Iron Company or its controlled companies and the coal departments or subsidiary companies of defendant railroads should be adjudged acts in pursuance of the unlawful combination and their further execution enjoined.

VIII.

THE ACQUISITION AND CONTINUED HOLDING BY THE ERIE RAILROAD COMPANY OF THE ENTIRE CAPITAL STOCKS OF THE PENNSYLVANIA COAL COMPANY, DELAWARE VALLEY & KINGSTON RAILROAD COMPANY, AND ERIE & WYOMING VALLEY RAILROAD COMPANY, RESTRAINS AND MONOPOLIZES TRADE AND COMMERCE AMONG THE STATES, IN VIOLATION OF THE ACT OF JULY 2, 1890.

The petition (paragraph VIIe) alleges that in 1899, after the abandonment of the New York, Wyoming & Western Railroad, the independent operators of the Wyoming region made a further attempt to carry out their project for a competitive railroad, and The Pennsylvania Coal Company, the strongest of them, producing annually 2,000,000 tons, and controlling the Erie & Wyoming Valley Railroad extending from a point near Scranton in the coal regions to Hawley, Pennsylvania, having secured sufficient pledges of tonnage from other operators, undertook to build a line from Hawley across the State of New York to Rondout (or Kingston) on the Hudson River, making a connected line from the coal regions to tidewater; and to that end organized, in New York, the Delaware Valley & Kingston Railroad, obtained from the railroad commission of that State, over the opposition of existing roads, the required certificate that the proposed road was necessary, and purchased for a road bed the abandoned Delaware & Hudson canal from Rondout on the Hudson River to Lackawaxen, Pennsylvania. (1 R., 23, 24.)

Whereupon, the charge continues—

> the Erie Railroad Company, * * * in furtherance of the unlawful combination hereinbefore charged and set forth, *and in violation of the aforesaid Act of July 2, 1890,*

> acquired, at an exorbitant price, to wit, $552 a share, more or less (the par value of a share being $100), nearly all of the capital stock of the Pennsylvania Coal Company, and also acquired all of the capital stock of the aforesaid Erie & Wyoming Valley Railroad Company and Delaware Valley & Kingston Railroad Company, which the Pennsylvania Coal Company controlled, thereby defeating the construction of the proposed independent railroad to tidewater and again preventing the introduction of competition in the transportation of anthracite coal from the mines to other States and in its sale throughout the several States. (1 R., 24.)

The petition does not specifically pray that the acquisition of these shares by the Erie Railroad be adjudged unlawful and the voting of them be enjoined, but does ask for general relief. (1 R., 28.)

The answer of the Erie Railroad admits the acquisition of the shares, but denies—

> that any of said stocks were purchased at an exorbitant price, or that any of them were purchased pursuant to an unlawful combination in violation of any Act of Congress, or that the purchase thereof prevented competition in the transportation of anthracite coal. (1 R., 86.)

The answer of The Pennsylvania Coal Company avers that the holders of its stock—

> had the lawful right to sell such stock, the Erie Railroad Company has the lawful right to buy it, * * * and no Act of Congress prohibited such sale of stock, or was thereby violated. (1 R., 114.)

The Circuit Court did not decide this branch of the case. The reason stated for not doing so was "that

there is no specific prayer in the petition for relief as to that particular transaction." (Opinion of Lanning, J., 1 R., 464.)

Its refusal to sustain this charge was assigned as error by the Government. (Assignment of errors, VII, X, 1 R., 471, 472.)

The evidence establishes—

That The Pennsylvania Coal Company, with an output of 2,404,554 tons in 1901 and 4,246,663 tons in 1907, was the largest producer and seller of anthracite outside the railroad circle;

That the proposed Delaware Valley & Kingston Railroad from the Hudson River to Lackawaxen, Pennsylvania, and the existing Erie & Wyoming Valley Railroad from the coal fields to Hawley, with its proposed extension to Lackawaxen, all controlled by The Pennsylvania Coal Company, constituted the links of a projected line from the coal fields to the Hudson River which The Pennsylvania Coal Company, assisted by other independent operators, was promoting;

That the independent operators' association, reciting that—

> independent operators and the general public are now largely at the mercy of existing railroad companies, which charge unreasonable rates for their services;

and that

> it would be highly advantageous to all the independent owners * * * to have the railroad connection, now proposed, completed as speedily as possible, * * * and equally desirable in the interests of the people

> of the State of New York and the public in general—

pledged

> its constant support and active assistance in promoting the speedy construction and completion of the said railroads;

That the Railroad Commissioners of New York, after full hearing at which the Erie Railroad appeared in opposition, unanimously certified that the projected line was necessary, a condition precedent to its construction across that State, and their decision was affirmed on appeal to the courts;

That the route, if completed, would have been an active competitor of the existing roads, particularly the Erie;

That The Pennsylvania Coal Company was admittedly able to complete it;

That The Pennsylvania Coal Company and Hillside Coal & Iron Company were competitive producers and sellers of anthracite in interstate commerce;

That in 1901 the Erie Railroad, through J. P. Morgan & Company, with the proceeds of 50,000 of its shares and $32,000,000 of bonds, acquired the entire capital stocks of The Pennsylvania Coal Company, Delaware Valley & Kingston Railroad, and Erie & Wyoming Valley Railroad, thereby defeating the projected competitive route and bringing under its own control 96 per cent of the anthracite production tributary to its lines. (The Facts Established *supra*, pp. 110–115.)

(1) The acquisition and continued holding by Erie Railroad of the capital stock of The Penn-

sylvania Coal Company is by itself unlawful, apart from its relation to the projected competitive railroad.

Before this acquisition the Erie had already engrossed a large part of the anthracite tributary to its lines, using as its instrument Hillside Coal & Iron Company. With the capture of The Pennsylvania Coal Company its monopoly was complete. Thus in 1907 of the total amount of anthracite—over 7,000,000 tons—transported by it, 96.14 per cent was shipped by coal companies whose every share it owned. (The Facts Established, *supra*, p. 48.)

Competition between Hillside Coal & Iron Company and The Pennsylvania Coal Company, two of the largest producers and dealers, was of course destroyed by uniting them under one control.

The law is that any act, contract, or combination not the "result of normal methods of industrial development," which, by destroying competition between traders, tends to enhance prices and produce the other evils of monopoly, restrains and monopolizes trade. (*Standard Oil Co.* v. *United States*, 221 U. S., 1; *United States* v. *American Tobacco Co.*, 221 U. S., 106; The Argument, V, *supra*, p. 293.)

Since, therefore, by the acquisition of The Pennsylvania Coal Company the Erie Railroad destroyed competition and monopolized the production of coal along its lines and the sale thereof throughout the States, its action was clearly unlawful if not a normal method of industrial development.

This it could not be:

First, because the Erie Railroad disavows having any coal business to develop and the concentration of control of an industry in a railroad corporation

itself not authorized to engage therein is not a normal method of industrial growth.

Secondly, because the declared and conceded purpose of this and other like acquisitions by the Erie was, by securing control of the anthracite production along or near its line, to exclude competition and monopolize to itself the transportation thereof. (Thomas, 5 R., 1117–1120.) Plainly, this is not a legitimate purpose—not a "normal method of industrial development." If it were, every railroad would be free to monopolize all the produce on its line.

If it be contended that the petition challenges the acquisition of The Pennsylvania Coal Company by the Erie Railroad only on the ground that thereby the projected competitive railroad was defeated and not as a monopolization by the Erie of the anthracite production tributary to its line, and that therefore only in the first mentioned character is the legality of the transaction in issue, we answer that the petition charges that "the Erie Railroad Company * * * *in violation of the aforesaid Act of July 2, 1890*, acquired * * * nearly all the capital stock of The Pennsylvania Coal Company," etc. (1 R., 24); and because it stated one theory of law to sustain that contention is of itself no reason why others may not be advanced at the hearing. (*Lockhart* v. *Leeds*, 195 U.S., 427; *McNairy* v. *Eastland*, 10 Yerger (Tenn.), 310,315.) Rules of pleading "must receive a reasonable interpretation, and must be so enforced as to further, and not obstruct, the administration of justice." (*Lockhart* v. *Leeds*, *supra*, p. 434.)

(2) The acquisition and continued holding by Erie Railroad Company of the shares of The Pennsylvania Coal Company, Delaware Valley & Kingston

Railroad Company, and Erie & Wyoming Valley Railroad Company also violates the Act of Congress because the *admitted purpose and result*, as shown, has been to defeat a proposed railroad route from the coal fields to tidewater that would have been an active and substantial competitor of the existing lines, especially the Erie. (The Facts Established, *supra*, pp. 111, 112; Thomas, 5 R., 1085, 1120.)

This proposition raises no question not already exhaustively discussed. (The Argument, V, pp. 277–292; VII, pp. 334–339.)

(3) The Circuit Court decreed (1 R., 466):

> That the defendants, * * * prior to the time the petition was filed, entered into, and at the time and since the filing of the said petition were and have been joined together in, a combination in restraint of trade and commerce among the several States, by and through the instrumentality of the defendant The Temple Iron Company, in violation of the Act of Congress, approved July 2, 1890, * * *.

The proof shows, as a majority of the Court found, that this combination was formed for the "avowed and conceded purpose" of defeating a project set on foot in 1898 by independent operators in the Wyoming coal region for a competitive railroad route from there to tidewater. (Opinions of Gray and Buffington, JJ., 1 R., 422, 423, 429, 435, 438; The Facts Established, *supra*, pp. 98–101.)

The first attempt to construct the proposed route took form in 1898 in the New York, Wyoming & Western Railroad, which the combination forthwith defeated by detaching from its support the Simpson

and Watkins collieries. (The Facts Established, *supra*, pp. 93–95; The Argument, VII, *supra*, pp. 332–336.)

That the proposed New York, Wyoming & Western Railroad was but a *step* in the attempted consummation of the project for a competitive road which defendants conspired through The Temple Iron Company to defeat, *and not the whole project*, is expressly recognized by Judge Gray (1 R., 423):

> It clearly appears from the evidence that a project for a railroad route from the coal fields in Pennsylvania to tidewater in New York, was being discussed and ostensibly promoted by named parties interested in the coal regions, notably the firm of Simpson & Watkins, and that the charter above referred to [the New York, Wyoming & Western's] had been obtained *as a step* toward the consummation of the purpose to construct such a route. [Italics ours.]

The proposed competitive route of which the Delaware Valley & Kingston and the Erie & Wyoming Valley were the component links and The Pennsylvania Coal Company the chief supporter was a renewal or continuation of the same general project which, as first attempted in the New York, Wyoming & Western Railroad, had been blocked by the combination of defendants only a few months before.

Thus the second effort followed immediately after the failure of the first. Each was supported by independent operators in the Wyoming region. Each contemplated a route from that region to tidewater. Each would have drawn its tonnage from the same source—independent operators in the Wyoming region. Each had the same object. (Sturges, 2 R., 286, 288, 289, 299; Fuller, 2 R., 472–75, 480, 481, 484.)

Indeed, the connection seems to be admitted, as the witness Sturges, in charge of the first of the two attempts to construct the proposed road and himself a large independent operator, testified without contradiction that the second, headed by The Pennsylvania Coal Company, was but a renewal of the first. (2 R., 288, 289.)

Here, then, is the situation:

The Erie Railroad and other defendants are adjudged parties to a combination to prevent the construction by independent operators in the Wyoming region of a proposed railroad that would compete with their own and also create competition for their coal companies in the sale of coal.

The first attempt to construct the proposed route is defeated by the joint action of all members of the combination.

A renewed attempt led and supported by The Pennsylvania Coal Company—the only independent left of sufficient resources to undertake such a work—is defeated by the Erie Railroad alone as the member of the combination most vitally affected.

This it does by acquiring *and holding* the entire capital stocks of The Pennsylvania Coal Company, and also of the Delaware Valley & Kingston Railroad and the Erie & Wyoming Valley Railroad, which were to own and operate the new line.

Such acquisition and holding was and is, therefore, an act directly in pursuance of the combination—adjudged unlawful by the Circuit Court—to prevent the construction of the competitive railroad projected by independent operators, and on that ground—besides the others mentioned—was and is

itself unlawful; and the Erie should be enjoined from voting the stocks so acquired and held or from transferring them to other members of the combination, who, in turn, should be severally enjoined from receiving them. The Circuit Court erred, we submit, in not so decreeing.

It would not matter had the Erie done this without the actual knowledge of other members of the combination. It is enough to make the act unlawful that it was done by a member of the combination during its continuance and in pursuance of its object. (*United States* v. *Kissel*, 218 U. S., 601, 608.)

Nor is this a mere past violation of law. The Erie is continuing to prevent the construction of the proposed route, and therefore continuing to enforce the object of the unlawful combination, by holding the stocks of and thereby controlling the corporations which were to build and support it. If the Erie released its control of The Pennsylvania Coal Company and the Delaware Valley & Kingston and Erie & Wyoming Valley railroads, the proposed route might be completed, as it is feasible, The Pennsylvania Coal Company is able to complete it, and the freight awaiting it is highly remunerative.

We come now to the objection that relief can not be given on this branch of the case because the petition does not specially pray for it. (Opinion of Lanning, J., 1 R., 464.)

The petition states the facts in relation to the acquisition by the Erie of the shares of The Pennsylvania Coal Company and the projected railroads, challenges the legality of the transaction, and prays

for general relief. (1 R., 23, 24, 28.) The issue thus tendered was accepted (1 R., 86, 114), and therefore defendants can not complain of surprise. Evidence was offered on both sides, and at the hearing the Government specified the relief desired. (Brief, Cir. Ct., p. 347.)

Will appropriate relief be denied in such case?

In view of the provision in Equity Rule 21 of this Court, that "the prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief," it may be that in not praying specific relief in the matter of the acquisition by the Erie of the stocks of The Pennsylvania Coal Company and the projected railroads the petition is informal, just as it might have been had it omitted the prayer for general relief or contained a prayer for specific relief based on a mistaken theory and therefore unavailable.

But the case having gone to final hearing without the defendants objecting by demurrer, or motion to strike from the files, or even in their answers, this defect is waived like any other defect of form.

Whether no special prayer is available because not inserted, or because, although one was inserted, it rested on a mistaken theory, can make no difference in principle. (*Wilkinson* v. *Beal*, 4 Mad., 408.)

A petition without a special prayer can therefore be no worse off than if along with a general prayer there was an inapplicable special one. If anything it is rather better off. (*Wilkinson* v. *Beal*, 4 Mad., 408.)

> A general prayer alone is better than a special prayer combined with a general prayer,

unless the special prayer is substantially correct. (Langdell, Eq. Pl., sec. 61.)

A general prayer alone is better than an incorrect special prayer, and also possibly better than a general prayer coupled with an incorrect special prayer. (1 Street, Fed. Eq. Pr., sec. 244.)

The rule in such cases is, we submit, that whether there is no special prayer at all or only a mistaken and unavailable one, the relief to which the plaintiff is entitled *on the case stated and proved* will be granted under the general prayer if it clearly follows the case stated and so does not unfairly surprise the defendant. (*Taylor* v. *The Merchants' Fire Ins. Co.*, 9 How., 390, 406; *Texas* v. *Hardenberg*, 10 Wall., 68; *Jones* v. *Van Doren*, 130 U. S., 684, 692; *Tyler* v. *Savage*, 143 U. S., 79, 98; *Kansas* v. *Colorado*, 185 U. S., 125, 145; *Lockhart* v. *Leeds*, 195 U. S., 427, 436, 437; *Cook* v. *Martyn*, 2 Atk., 2; *Grimes* v. *French*, 2 Atk., 141; *Stewart* v. *Gloog*, Macl. & R., 721, 756; *Beaumont* v. *Boultbee*, 5 Ves., 485, 495; *Hiern* v. *Mill*, 13 Ves., 114, 119; *Cockerell* v. *Dickens*, 3 Moore P. C., 98, 135; *Roche* v. *Margell*, 2 Sch. & Lef., 721; *Wilkinson* v. *Beal*, 4 Mad., 408; *Brown* v. *Sewell*, 17 Juris., 708; *Brookes* v. *Boucher*, 3 N. R., 279; *Moore* v. *Mitchell*, 2 Woods, 483, 489; *Patrick* v. *Isenhart*, 20 Fed., 339; *Lewis Pub. Co.* v. *Wyman*, 182 Fed., 21, opinion of Sanborn, J.; *Cook* v. *Mancius*, 5 John. Ch., 89; *Miller* v. *Lord*, 11 Pick., 11, 27; *Lingan* v. *Henderson*, 1 Bland (Md.), 236, 250; *Driver* v. *Fortner*, 5 Porter (Ala.), 9, 26; *Hardy* v. *La Dow*, 72 Kans., 174, 177; *Dewey* v. *Todd*, Wash. L. Rep., decided early in 1911; *1 Street, Fed. Eq. Pr.*, sec. 243; *Story, Eq. Pl.*, 10th ed., sec. 41; *Fletcher, Eq. Pl. & Pr.*, 110, 11.)

In *Tyler* v. *Savage* (*supra*) the bill, while stating a case against one of the defendants, Tyler, did not pray specially for any relief as against him; but this Court affirmed a decree of the lower court awarding relief under the general prayer, saying (p. 98):

> The relief against Tyler was properly granted under the prayer of the bill for general relief.

In *Taylor* v. *The Merchants' Fire Ins. Co.* (*supra*), *Texas* v. *Hardenberg* (*supra*) and *Jones* v. *Van Doren* (*supra*) the bills were in no better position—probably worse—than if the special prayers had been omitted altogether. For those inserted were inapplicable. Yet in each case this Court awarded appropriate relief under the general prayer, saying in one in answer to the contention that there was no special prayer under which relief could be given—

> that the prayer for general relief * * * will enable the Court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill. (9 How., 406.)

And in another that—

> the bill contains a prayer for general relief. This is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify. (130 U. S., 692.)

In *Kansas* v. *Colorado* (*supra*) the rule stated in *Taylor* v. *The Merchants' Fire Ins. Co.* (9 How., 406) was expressly approved (p. 145). In *Lockhart* v. *Leeds* (*supra*) it was again affirmed and apparently extended (pp. 436, 437).

In *Hiern* v. *Mill* (*supra*) Lord Erskine said (p. 119):

> As to that the rule is, that, if the bill contains charges, putting facts in issue that are

> material, the plaintiff is entitled to the relief which those facts will sustain, under the general prayer; * * *

In *Wilkinson* v. *Beal* (*supra*) Vice Chancellor Sir John Leach observed (p. 408)—

> that, if a party prays particular relief, to which he is not entitled, he may nevertheless, under the prayer for general relief, have such relief as he is entitled to upon the case alleged and proved, and that he could not be in a worse situation because he had not prayed particular relief to which he was not entitled.

It follows that the Government is not barred from relief in respect of the acquisition by Erie Railroad Company of the shares of The Pennsylvania Coal Company, Delaware Valley & Kingston Railroad Company, and Erie & Wyoming Valley Railroad Company because the petition does not specially pray therefor. It may be awarded under the general prayer.

IX.

THE ACQUISITION AND CONTROL BY LEHIGH VALLEY RAILROAD COMPANY (DIRECTLY OR THROUGH ITS SUBSIDIARY, THE LEHIGH VALLEY COAL COMPANY) OF CONNELL COAL COMPANY, SENECA COAL COMPANY, WARRIOR RUN COAL COMPANY, WYOMING COAL & LAND COMPANY, RIGHTER COAL COMPANY, COXE BROTHERS & COMPANY, PRODUCERS AND SHIPPERS TRIBUTARY TO ITS LINE, AND OF DELAWARE, SUSQUEHANNA & SCHUYLKILL RAILROAD COMPANY, CONSTITUTE ACTS IN AID OF THE OBJECT OF THE GENERAL COMBINATION OF DEFENDANTS TO CONTROL AND MONOPOLIZE THE ANTHRACITE COAL TRADE, AND AS SUCH ARE VIOLATIVE OF THE ACT OF CONGRESS.

It is established—

That between 1900 and 1905 The Lehigh Valley Coal Company, which shipped 40 per cent of the anthracite transported by the Lehigh Valley

Railroad in 1898, absorbed, with the credit of the railroad, the following independent producers and shippers tributary thereto—Connell Coal Company, Seneca Coal Company, Warrior Run Coal Company, Wyoming Coal & Land Company, and Righter Coal Company;

That in 1905 the Lehigh Valley Railroad acquired from the Coxe Estate the entire capital stocks of Coxe Brothers & Company and the Delaware, Susquehanna & Schuylkill Railroad, a gathering line serving the collieries of the Coxe company and other producers (also $60,000 of the stock of certain water companies); raising the price, $19,000,000, by an issue of bonds secured by a mortgage of the purchased shares;

That Coxe Brothers & Company was then the largest independent operator left, possessing over 5,000 acres of coal lands and selling its output at New York Harbor and other markets throughout the country in competition with The Lehigh Valley Coal Company, amongst others;

That the Delaware, Susquehanna & Schuylkill Railroad, connecting numerous collieries with four trunk lines and capable of so connecting others, was an important factor in preserving competition in the transportation of anthracite;

That the president and secretary of the Lehigh Valley Railroad testified that these acquisitions were in pursuance of its purpose to control the anthracite production along its line so as to prevent competition for the tonnage—a purpose so far accomplished that in 1908, of the total anthracite tonnage of the Lehigh Valley Railroad, The Lehigh Valley Coal Company

shipped 85.69 per cent as compared with 40.8 per cent in 1898. (The Facts Established, *supra*, pp. 115–117.)

In so acquiring and controlling, one after another, independent producers and shippers along its line during the continuance of the General Combination to control and monopolize the anthracite trade, the Lehigh Valley Railroad, a member of that combination, is aiding and abetting the same.

For as each confederated railroad, by absorbing competitors, extends its control over the production along its own line, it increases the power and control of the combination over the trade as a whole and brings a step nearer that ideal monopoly—not far off as it is—that would exist if each road controlled the entire production tributary to it.

The acquisition and control by the Lehigh Valley Railroad of the above enumerated corporations should therefore be adjudged acts in aid of an unlawful combination, and its further control of them enjoined.

It is no valid objection, we submit, that the petition does not specifically set forth these acquisitions and allege them to be in aid of the General Combination to control and monopolize the anthracite trade.

It expressly puts defendants on notice that the acts alleged as in aid of the General Combination are "among others"—not all. (1 R., p. 17.) If others be proved no reason is perceived why they may not also be enjoined under the general prayer and complete relief against the combination thus afforded.

X.

THE OBJECTION OF MULTIFARIOUSNESS WILL NOT BE CONSIDERED BY THIS COURT.

The answers objected that the separate acts charged against varying groups of defendants as independently unlawful without reference to any general combination made the petition multifarious. For example, that of Reading Company states (1 R., 54):

> That it appears by said petition that the same is exhibited against this defendant, and the several other corporations therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said petition, this defendant is not in any manner interested or concerned, * * * [and] in several whereof, as appears by the petition, the said other defendants are not, and neither of them is, in any manner interested or concerned, * * * wherefore the said petition is altogether multifarious.

Hoping, perhaps, to meet the rule that this objection must be presented *in limine*, motions to dismiss the bill for multifariousness were also filed, but not until petitioner had concluded its evidence. (1 R., 383–386.) Aside from the fact that in no sense could that stage of the case be *in limine*, these motions could avail defendants nothing, since a motion to dismiss a bill prior to final hearing is not recognized in the Federal Courts of Equity. (*Betts* v. *Lewis*, 19 How., 72; *LaVega* v. *Lapsley*, 1 Woods, 428; *Strang* v. *Richmond, &c. Co.*, 101 Fed., 511; *Fuller* v. *Met. Life Ins. Co.*, 31 Fed., 696.) They were accordingly passed until final hearing.

The Circuit Court refused to sustain this objection. (Opinions, Buffington and Lanning, JJ., 1 R., 427, 442–443.)

Obviously, it could not have been contended that the petition was multifarious if the transactions of varying groups of defendants set forth in paragraphs VIIa, VIIb, VIIc, VIId, and VIIe had been alleged only as steps in the development of the General Combination amongst all defendants set forth in paragraph VII. It was because these transactions were alleged to be separately and independently in violation of the Act of Congress, irrespective of any general combination, that defendants made the objection of multifariousness. (See Ans., Reading Co., *supra.*) The root of that objection was that, if there were no general combination to which the transactions stated were related, the petition should not be entertained, as it would then state several distinct and unconnected causes of action which could not properly be heard in one suit.

Therefore, in failng to sustain the objection of multifariousness while holding there was no such general combination, the Court decided that these distinct causes of action might properly be determined in the one suit, at least when the objection was not presented for decision *in limine.* And it did determine them. (Per *curiam* opinion, 1 R., 465.)

That is the end of the matter, for when the objection of multifariousness—merely one of inconvenience—does not prevail below, and there has been a trial, it will not be considered by this Court. (*Graves* v. *Ashburn*, 215 U. S., 331, 335; *Herndon* v. *Chicago, R. I. & R. Co.*, 218 U. S., 135, 154–155.)

> The objection of multifariousness is an objection of inconvenience. The defendants did not stand upon their demurrers setting it up. There has been a trial after long delay. In view of the evidence and the fact that the objection did not prevail with the lower Courts, we are of opinion that it should not prevail now. (*Graves* v. *Ashburn, supra*, p. 335.)
>
> It is asserted that the bill is multifarious. * * * But no objection to such joinder of the parties was specially taken, and it is well settled that an objection of this character must be promptly made. The proper way to raise such question is by special demurrer, specifically directed to the objection. (1 Street, Fed. Eq. Pr., sec. 936.) It is true that a court may itself take the objection in extreme cases, when that course is essential to the necessary and proper administration of justice. But, as laid down in *Oliver* v. *Piatt* (3 How., 333, 412), by Mr. Justice Story, speaking for the Court, if the court can get to a final decree without serious embarrassment, it will do so; and says the learned justice: "*A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity." No such case exists here. (*Herndon* v. *Chicago R. I. & R. Co., supra*, pp. 154–155.)

Neither is this such a case. For as Judge Lanning states (1 R., 443):

> * * * there is no difficulty, except that of examining the evidence as to the several issues involved, in disposing of the case and entering a decree consistent, as we think, with its equities.

Furthermore, defendants did *not* assign as error the action of the court below in refusing to sustain

the objection of multifariousness and determining in the one proceeding as well the alleged separate and distinct violations of the Act by varying groups of defendants as the charge of a general combination embracing all. For this further reason, therefore, they can not now press that objection. (*Bitterman* v. *Louisville & N. R. Co.*, 207 U. S., 205, 226.)

Believing, for the reasons stated, that the objection of multifariousness will not be considered by this Court, we do not further discuss it here. Should it be considered, however, we ask attention to the argument respecting it in the Government's brief below (pp. 305–344), copies of which will be filed with the Clerk.

XI.

THE ADMISSIBILITY OF THE EVIDENCE OBJECTED TO BY DEFENDANTS IS NOT BEFORE THIS COURT FOR DECISION. BUT THE EVIDENCE WAS COMPETENT.

Defendants moved that certain evidence introduced by the Government, none of it vital, be struck from the record. (1 R., 336–382; 388–391.) No action was taken on this motion. The failure of the Circuit Court to rule out the evidence objected to was not, however, assigned as error. Its admissibility, we think, is therefore not before this Court.

Nevertheless, we will briefly indicate the grounds on which the more important items *are* admissible.

1. *The deposition in a former case of Alfred Walter, deceased.*

Mr. Walter was president of the Lehigh Valley Railroad and The Lehigh Valley Coal Company from 1897 to 1902.

In 1904, before the Interstate Commerce Commission (3 R., 332), he testified respecting the attempted

Pooling Agreement of 1896, the 65 Per Cent Contracts, and The Temple Iron Company—matters in which he was an important actor—each in issue there as here. All the present defendant railroads were parties to that proceeding and had opportunity to cross-examine Mr. Walter. (3 R., 332.) He *was* cross-examined by counsel for the Lehigh Valley. (3 R., 378.)

He died before the institution of this suit. His testimony as to the acts here in question in which he took part being authoritative, his former deposition, duly certified by the secretary of the Commission under its seal, was introduced by the Government. (2 R., 580; 3 R., 332–380.)

We submit that all conditions on which a former deposition of a deceased witness is admissible are here satisfied. (2 Wigmore on Evid., secs. 1373 et seq.; 10 Cyc., 947 et seq.) That the Interstate Commerce Commission is not a law court is unimportant. (2 Wigmore on Evid., sec. 1373.)

2. *Testimony of John B. Kerr respecting The Temple Iron Company.*

In a bill—filed while the transaction was still fresh—Vice President Kerr, of the New York, Ontario & Western Railway stated under oath:

> That during the winter of 1899 the plaintiff [New York, Ontario & Western Railway] was requested to join certain other railroad corporations engaged in the transportation of anthracite coal, namely, the Philadelphia & Reading Railway Company, the Lehigh Valley Railroad Company, The Central Railroad of New Jersey, the Delaware, Lackawanna &

> Western Railroad Company, the Erie Railroad Company, and The New York, Susquehanna & Western Railroad Company (whose railroads, with that of the plaintiff, embrace all the railroads leading from the anthracite coal fields to tidewater, with the exception of that of the Pennsylvania Railroad Company), in a plan to buy up certain collieries owned by so-called "individual operators," and in that way not only control a larger percentage of the coal mined, but defeat the construction of any new line; but the plaintiff declined to enter into any such combination. (2 R., 171.)

This allegation is unqualified, differing from others in the bill made upon information and belief. Mr. Kerr, testifying in the present case, confirmed this statement. (2 R., 172.) It is therefore admissible, as any other germane statement by a witness upon knowledge.

3. *The deposition of Joseph S. Harris in a former case.*

Combinations to pool the anthracite tonnage, in which the principal defendants here were members, existed from 1884 to 1887. They held meetings of which minutes were kept by Mr. Harris, who acted as secretary. He was subpœnaed to produce these minutes but could not find them. (2 R., 19.) Copies had been preserved, however, in testimony given by him in 1886 in a suit by the State of Pennsylvania. That this secondary evidence of the minutes might be had, a duly authenticated copy of this testimony was introduced. (2 R., 259; 3 R., 239.) No other part of the deposition was used. But had this part only been offered the objection then doubt-

less would have been that it could not be separated from its context.

4. *The compilations of freight rates on anthracite and bituminous coal.*

Instead of introducing voluminous tariff sheets the Government extracted the rates it desired, compiling them into tables, which, duly certified by the secretary of the Interstate Commerce Commission under its seal, were introduced in evidence. (Govt. Exs. Nos. 160, 181; 3 R., 381–389; 438–440.) This saved time, space, and money, and we understood that the objection was only to protect defendants against possible inaccuracies in the compilations.

However, the Act to Regulate Commerce expressly provides that such extracts, so certified, "shall be received in evidence with like effect as the original."

> * * * copies of *or extracts from* any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals. (Sec. 16, last par.)

XII.

OUTLINE OF THE RELIEF SOUGHT IN THIS COURT.

The Circuit Court dismissed all the charges of the petition except the one in respect of The Temple Iron Company, and the relief awarded as to that was not as broad as the case justified. The Government asks that the action below be corrected, and that a decree be entered here which will afford in substance the relief indicated hereunder.

First. That all the defendants be adjudged engaged in a combination by which defendant Reading Com-

pany and defendant railroads and their affiliated coal companies control, restrain, and monopolize the production, transportation, and sale of anthracite among the States, in violation of Sections 1 and 2 of the Act of July 2, 1890; and that they be enjoined from doing anything in pursuance thereof, and especially from continuing the same by establishing and maintaining uniform prices for the purchase of coal from other producers, by controlling the production of other producers, by receiving less than the published freight rates on coal sold to them and transported to New York Harbor, by establishing and maintaining uniform prices to consumers, or by any similar means.

Second. That the 65 per cent contracts, so-called, made by the defendants The Philadelphia & Reading Coal & Iron Company, The Lehigh & Wilkes-Barre Coal Company, The Lehigh Valley Coal Company, The Delaware, Lackawanna & Western Railroad Company, Hillside Coal & Iron Company, and The New York, Susquehanna & Western Coal Company, with the various independent producers before the Court, for the control of their output, be adjudged to restrain and monopolize trade in violation of said Act, and that all parties thereto, respectively, be enjoined from further carrying them out and from entering into any similar contracts or arrangements restraining or monopolizing trade in anthracite coal, etc.

Third. That the control by Reading Company, through stock ownership, of Philadelphia & Reading Railway Company, The Philadelphia & Reading Coal & Iron Company, The Central Railroad Company of New Jersey and The Lehigh & Wilkes-Barre Coal

Company, be adjudged a combination in restraint of trade and a monopolization thereof in violation of said Act, and that all parties thereto be enjoined from continuing the same, and that especially Reading Company be enjoined from voting or receiving dividends on any shares of said corporations or otherwise exercising any control over them, etc.

Fourth. That the control by Erie Railroad Company, through stock ownership, of The New York, Susquehanna & Western Railroad Company, be adjudged a combination in restraint of trade and a monopolization thereof in violation of said Act, and that all parties thereto be enjoined from continuing the same, and that especially the first named company be enjoined from voting or receiving dividends on any shares of the second or otherwise exercising any control over it, etc.

Fifth. That it be adjudged that defendants Reading Company, Philadelphia & Reading Railway Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Lehigh Valley Railroad Company, Erie Railroad Company, The New York, Susquehanna & Western Railroad Company, The Philadelphia & Reading Coal & Iron Company, The Lehigh & Wilkes-Barre Coal Company, The Lehigh Valley Coal Company, Hillside Coal & Iron Company, The Pennsylvania Coal Company, and The New York, Susquehanna & Western Coal Company, before, at, and since the filing of the petition were and are joined, through The Temple Iron Company, in a combination in restraint of trade in violation of said Act, in pursuance of which they caused the last-named company to acquire the stocks of the seven independent mining

companies formerly controlled by Simpson and Watkins and the output thereof to be bound to them under 65 per cent contracts; that all parties to such combination be enjoined from continuing it, and each be further enjoined from voting or receiving profits on any shares of The Temple Iron Company or exercising any control over it, from carrying out the aforesaid 65 per cent contracts made with it or its subsidiaries, and from receiving any transfer of the shares, collieries, or business of the seven mining companies acquired by it at their direction; and that The Temple Iron Company be enjoined from voting or receiving profits on the shares of the seven mining companies so acquired by it, and from in any manner exercising control over them or their property; also that The Temple Iron Company be adjudged in and of itself an unlawful combination, etc.

[The decree below granted this relief, except (1) it did not adjudge that the above-named *coal companies*, controlled by the railroads, are parties to the combination, nor specifically prohibit them from being transferees of the shares, collieries, or businesses vested in The Temple Iron Company in pursuance of the combination; (2) it did not adjudge that the 65 per cent contracts binding the output of the collieries controlled by The Temple Iron Company to railroads in the combination or their coal companies were made in pursuance thereof and enjoin them; and (3) it did not adjudge that The Temple Iron Company is itself an unlawful combination.]

Sixth. That it be adjudged that the shares of The Pennsylvania Coal Company, Delaware Valley & Kingston Railroad Company, and Erie & Wyoming Valley Railroad Company owned by defendant Erie

Railroad Company were acquired and are held in violation of said Act, and that Erie Railroad Company be enjoined from voting such shares and from receiving any dividends or other profits arising therefrom, etc.

Seventh. That it be adjudged that the shares of Coxe Brothers & Company, Inc., Righter Coal Company, Wyoming Coal & Iron Company, Warrior Run Coal Company, Seneca Coal Company, and Connell Coal Company were acquired by defendants Lehigh Valley Railroad Company or The Lehigh Valley Coal Company in violation of said Act, and that each be enjoined from voting the same, from receiving any profits arising therefrom, and from exercising any control over the management or property of such companies, etc.

In support of the nature of the relief asked, it suffices to refer to *Northern Securities Company's case* (193 U. S., 197), *Swift & Company* v. *United States* (196 U. S., 375), *Standard Oil Company* v. *United States* (221 U. S., 1), and *United States* v. *American Tobacco Company* (221 U. S., 106).

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OCTOBER, 1911.

APPENDIX A.

TABLE I.

Results of 60 Per Cent Contracts in 1892 in Respect of Coal Shipped to New York Harbor f. o. b. Vessel.

Size.	Average selling price received at New York Harbor, f. o. b.[1]	Cost price.[2]	Expense of Selling.[2]	Wastage.[2]	Amount left to pay freight.	Published freight rate to New York Harbor, f. o. b.[4]	Deficiency.
JANUARY.							
Broken	$3.40	$2.04	$0.10	$0.05	$1.21	$1.75	$0.54
Egg	3.53	2.13	.10	.05	1.27	1.75	.48
Stove	3.72	2.23	.10	.05	1.34	1.75	.41
Chestnut	3.28	1.97	.10	.05	1.16	1.75	.59
FEBRUARY.							
Broken	3.39	2.03	.10	.05	1.21	1.75	.54
Egg	3.43	2.06	.10	.05	1.22	1.75	.53
Stove	3.56	2.14	.10	.05	1.27	1.75	.48
Chestnut	3.28	1.97	.10	.05	1.16	1.75	.59
MARCH.							
Broken	3.40	2.04	.10	.05	1.21	1.75	.54
Egg	3.72	2.23	.10	.05	1.34	1.75	.41
Stove	3.71	2.23	.10	.05	1.33	1.75	.42
Chestnut	3.36	2.02	.10	.05	1.19	1.75	.56
APRIL.							
Broken	3.41	2.05	.10	.05	1.21	1.75	.54
Egg	3.73	2.24	.10	.05	1.34	1.75	.41
Stove	3.80	2.28	.10	.05	1.37	1.75	.38
Chestnut	3.45	2.07	.10	.05	1.23	1.75	.52
MAY.							
Broken	3.43	2.06	.10	.05	1.22	1.75	.53
Egg	3.74	2.24	.10	.05	1.35	1.75	.40
Stove	3.87	2.32	.10	.05	1.40	1.75	.35
Chestnut	3.59	2.15	.10	.05	1.29	1.75	.46
JUNE.							
Broken	3.51	2.11	.10	.05	1.25	1.75	.50
Egg	3.92	2.35	.10	.05	1.42	1.75	.33
Stove	4.06	2.44	.10	.05	1.47	1.75	.28
Chestnut	3.95	2.37	.10	.05	1.43	1.75	.32
JULY.							
Broken	3.84	2.30	.10	.05	1.39	1.75	.36
Egg	4.01	2.41	.10	.05	1.45	1.75	.30
Stove	4.17	2.50	.10	.05	1.52	1.75	.23
Chestnut	4.01	2.41	.10	.05	1.45	1.75	.30
AUGUST.							
Broken	3.86	2.32	.10	.05	1.39	1.75	.36
Egg	4.22	2.53	.10	.05	1.54	1.75	.41
Stove	4.41	2.65	.10	.05	1.61	1.75	.14
Chestnut	4.28	2.57	.10	.05	1.56	1.75	.19
SEPTEMBER.							
Broken	3.86	2.32	.10	.05	1.39	1.75	.36
Egg	4.32	2.59	.10	.05	1.58	1.75	.17
Stove	4.60	2.76	.10	.05	1.69	1.75	.06
Chestnut	4.47	2.68	.10	.05	1.64	1.75	.11
OCTOBER.							
Broken	3.80	2.28	.10	.05	1.37	1.85	.48
Egg	4.40	2.64	.10	.05	1.61	1.85	.24
Stove	4.66	2.80	.10	.05	1.71	1.85	.14
Chestnut	4.60	2.76	.10	.05	1.69	1.85	.16
NOVEMBER.							
Broken	3.71	2.23	.10	.05	1.33	1.85	.52
Egg	4.36	2.62	.10	.05	1.59	1.85	.26
Stove	4.62	2.77	.10	.05	1.70	1.85	.15
Chestnut	4.54	2.72	.10	.05	1.67	1.85	.18
DECEMBER.							
Broken	3.74	2.24	.10	.05	1.35	1.85	.50
Egg	4.33	2.60	.10	.05	1.58	1.85	.27
Stove	4.61	2.77	.10	.05	1.69	1.85	.16
Chestnut	4.49	2.69	.10	.05	1.65	1.85	.20

[1] Bul. Dept. Labor, No. 39, March, 1902, pp. 384-87.
[2] 60 per cent of average selling price at New York Harbor.
[3] *Supra*, p. 52.
[4] L. V. R. R., Ex. No. 14, 6 R., 190; de Forest, 2 R., 651; Ziegler, 2 R., 703.

TABLE II.

Results of 60 Per Cent Contracts in 1899 in Respect of Coal Shipped to New York Harbor, f. o. b. Vessel.

Size.	Average selling price at New York Harbor, f.o.b.[1]	Cost price.[2]	Expense of selling.[2]	Wastage.[3]	Amount left to pay freight.	Published freight rate per ton to New York Harbor, f. o. b.[4]	Deficiency.
JANUARY.							
Broken	$3.19	$1.91	$0.10	$0.05	$1.13	$1.55	$0.42
Egg	3.31	1.99	.10	.05	1.17	1.55	.38
Stove	3.56	2.14	.10	.05	1.27	1.55	.28
Chestnut	3.45	2.07	.10	.05	1.23	1.55	.32
FEBRUARY.							
Broken	3.16	1.90	.10	.05	1.11	1.55	.44
Egg	3.29	1.97	.10	.05	1.17	1.55	.38
Stove	3.54	2.12	.10	.05	1.27	1.55	.28
Chestnut	3.47	2.08	.10	.05	1.24	1.55	.31
MARCH.							
Broken	3.17	1.90	.10	.05	1.12	1.55	.43
Egg	3.28	1.97	.10	.05	1.16	1.55	.39
Stove	3.52	2.11	.10	.05	1.26	1.55	.29
Chestnut	3.48	2.09	.10	.05	1.24	1.55	.31
APRIL.							
Broken	3.12	1.87	.10	.05	1.10	1.55	.45
Egg	3.30	1.98	.10	.05	1.17	1.55	.38
Stove	3.56	2.14	.10	.05	1.27	1.55	.28
Chestnut	3.49	2.09	.10	.05	1.25	1.55	.30
MAY.							
Broken	3.11	1.87	.10	.05	1.09	1.55	.46
Egg	3.30	1.98	.10	.05	1.17	1.55	.38
Stove	3.62	2.17	.10	.05	1.30	1.55	.25
Chestnut	3.55	2.13	.10	.05	1.27	1.55	.28
JUNE.							
Broken	3.11	1.87	.10	.05	1.09	1.55	.46
Egg	3.28	1.97	.10	.05	1.16	1.55	.39
Stove	3.64	2.18	.10	.05	1.31	1.55	.24
Chestnut	3.57	2.14	.10	.05	1.28	1.55	.27
JULY.							
Broken	3.11	1.87	.10	.05	1.09	1.55	.46
Egg	3.29	1.97	.10	.05	1.17	1.55	.38
Stove	3.67	2.20	.10	.05	1.32	1.55	.23
Chestnut	3.61	2.17	.10	.05	1.29	1.55	.26
AUGUST.							
Broken	3.11	1.87	.10	.05	1.09	1.55	.46
Egg	3.31	1.99	.10	.05	1.17	1.55	.38
Stove	3.68	2.21	.10	.05	1.32	1.55	.23
Chestnut	3.61	2.17	.10	.05	1.29	1.55	.26
SEPTEMBER.							
Broken	3.12	1.87	.10	.05	1.10	1.55	.45
Egg	3.39	2.03	.10	.05	1.21	1.55	.34
Stove	3.80	2.28	.10	.05	1.37	1.55	.18
Chestnut	3.71	2.23	.10	.05	1.33	1.55	.22
OCTOBER.							
Broken	3.12	1.87	.10	.05	1.10	1.55	.45
Egg	3.53	2.12	.10	.05	1.26	1.55	.29
Stove	3.90	2.34	.10	.05	1.41	1.55	.14
Chestnut	3.85	2.31	.10	.05	1.39	1.55	.16
NOVEMBER.							
Broken	3.13	1.88	.10	.05	1.10	1.55	.45
Egg	3.57	2.14	.10	.05	1.28	1.55	.27
Stove	3.95	2.37	.10	.05	1.43	1.55	.12
Chestnut	3.92	2.35	.10	.05	1.42	1.55	.13
DECEMBER.							
Broken	3.12	1.87	.10	.05	1.10	1.55	.45
Egg	3.58	2.15	.10	.05	1.28	1.55	.27
Stove	3.98	2.39	.10	.05	1.44	1.55	.11
Chestnut	3.97	2.38	.10	.05	1.44	1.55	.11

[1] Bul. Dept. Labor, No. 30, March, 1902, pp. 384–87.
[2] 60 per cent of average selling price at New York Harbor.
[3] *Supra*, p. 52.
[4] Govt. Ex. No. 160, 3 R., 383, 384, 386.

TABLE III.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Lehigh Valley Railroad to Perth Amboy (New York Harbor), f. o. b. Vessel.

Size.	Average price received at Perth Amboy f. o. b.[1]	Cost Price.[2]	Expense of Selling.[2]	Wastage.[2]	Amount left for Freight.	Published freight rate to Perth Amboy f. o. b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.18	$2.17	$0.10	$0.05	$0.86	$1.55	$0.69	.....
Egg	3.60	2.53	.10	.05	.92	1.55	.63	.....
Stove	4.32	2.80	.10	.05	1.37	1.55	.18	.....
Chestnut	4.35	2.80	.10	.05	1.39	1.55	.16	.....
Pea	2.32	1.23	.05	.....	1.04	1.40	.36	.....
Buck. No. 1	1.76	.79	.05	.....	.92	1.25	.33	.....
Buck. No. 2	1.33	.30	.05	.....	.98	1.25	.27	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
DECEMBER, 1900.								
Broken	3.26	2.16	.10	.05	.95	1.55	.60	.....
Egg	3.76	2.54	.10	.05	1.07	1.55	.48	.....
Stove	4.32	2.87	.10	.05	1.30	1.55	.25	.....
Chestnut	4.34	2.88	.10	.05	1.31	1.55	.24	.....
Pea	2.34	1.25	.05	.....	1.04	1.40	.36	.....
Buck. No. 1	1.77	.77	.05	.....	.95	1.25	.30	.....
Buck. No. 2	1.35	.30	.05	.....	1.00	1.25	.25	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JANUARY, 1901.								
Broken	3.43	2.12	.10	.05	1.16	1.55	.39	.....
Egg	3.83	2.53	.10	.05	1.15	1.55	.40	.....
Stove	4.36	2.88	.10	.05	1.33	1.55	.22	.....
Chestnut	4.36	2.89	.10	.05	1.32	1.55	.23	.....
Pea	2.42	1.30	.05	.....	1.07	1.40	.33	.....
Buck. No. 1	1.82	.80	.05	.....	.97	1.25	.28	.....
Buck. No. 2	1.40	.30	.05	.....	1.05	1.25	.20	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
FEBRUARY, 1901.								
Broken	3.42	2.15	.10	.05	1.12	1.55	.43	.....
Egg	3.78	2.47	.10	.05	1.16	1.55	.39	.....
Stove	4.39	2.88	.10	.05	1.36	1.55	.19	.....
Chestnut	4.37	2.88	.10	.05	1.34	1.55	.21	.....
Pea	2.46	1.28	.05	.....	1.13	1.40	.27	.....
Buck. No. 1	1.82	.81	.05	.....	.96	1.25	.29	.....
Buck. No. 2	1.35	.30	.05	.....	1.00	1.25	.25	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MARCH, 1901.								
Broken	3.42	2.16	.10	.05	1.11	1.55	.44	.....
Egg	3.77	2.44	.10	.05	1.18	1.55	.37	.....
Stove	4.40	2.86	.10	.05	1.39	1.55	.16	.....
Chestnut	4.36	2.87	.10	.05	1.34	1.55	.21	.....
Pea	2.52	1.27	.05	.....	1.20	1.40	.20	.....
Buck. No. 1	1.90	.81	.05	.....	1.04	1.25	.21	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.25	.22	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

[1] Govt. Ex. No. 15, 3 R. 55 et seq.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region: pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Petition, 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 38.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 386.

TABLE III—Continued.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Lehigh Valley Railroad to Perth Amboy (New York Harbor), f. o. b. Vessel.

Size.	Average price received at Perth Amboy f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Perth Amboy f. o. b.	Deficiency.	Excess.
APRIL, 1901.								
Broken	$3.43	$2.22	$0.10	$0.05	$1.06	$1.55	$0.49	.....
Egg	3.57	2.40	.10	.05	1.02	1.55	.53	.....
Stove	3.91	2.57	.10	.05	1.19	1.55	.36	.....
Chestnut	3.89	2.56	.10	.05	1.18	1.55	.37	.....
Pea	2.26	1.25	.05	.....	.96	1.40	.44	.....
Buck. No. 1	1.76	.81	.05	.....	.90	1.25	.35	.....
Buck. No. 2	1.28	.30	.05	.....	.93	1.25	.32	.....
Buck. No. 3								
MAY, 1901.								
Broken	3.51	2.25	.10	.05	1.11	1.55	.44	.....
Egg	3.80	2.48	.10	.05	1.17	1.55	.38	.....
Stove	4.08	2.65	.10	.05	1.28	1.55	.27	.....
Chestnut	4.08	2.65	.10	.05	1.28	1.55	.27	.....
Pea	2.48	1.25	.05	.....	1.18	1.40	.22	.....
Buck. No. 1	1.88	.83	.05	.....	1.00	1.25	.25	.....
Buck. No. 2	1.40	.30	.05	.....	1.05	1.25	.20	.....
Buck. No. 3								
JUNE, 1901.								
Broken	3.60	2.27	.10	.05	1.18	1.55	.37	.....
Egg	3.94	2.54	.10	.05	1.25	1.55	.30	.....
Stove	4.19	2.70	.10	.05	1.34	1.55	.21	.....
Chestnut	4.18	2.71	.10	.05	1.32	1.55	.23	.....
Pea	2.49	1.24	.05	.....	1.20	1.40	.20	.....
Buck. No. 1	1.90	.82	.05	.....	1.03	1.25	.22	.....
Buck. No. 2	1.39	.30	.05	.....	1.04	1.25	.21	.....
Buck. No. 3								
JULY, 1901.								
Broken	3.64	2.29	.10	.05	1.20	1.55	.35	.....
Egg	4.04	2.60	.10	.05	1.29	1.55	.26	.....
Stove	4.29	2.77	.10	.05	1.37	1.55	.18	.....
Chestnut	4.29	2.77	.10	.05	1.37	1.55	.18	.....
Pea	2.54	1.29	.05	.....	1.20	1.40	.20	.....
Buck. No. 1	1.99	.84	.05	.....	1.10	1.25	.15	.....
Buck. No. 2	1.33	.30	.05	.....	.98	1.25	.27	.....
Buck. No. 3								
AUGUST, 1901.								
Broken	3.73	2.28	.10	.05	1.30	1.55	.25	.....
Egg	4.11	2.66	.10	.05	1.30	1.55	.25	.....
Stove	4.37	2.83	.10	.05	1.39	1.55	.16	.....
Chestnut	4.38	2.84	.10	.05	1.39	1.55	.16	.....
Pea	2.56	1.33	.05	.....	1.18	1.40	.22	.....
Buck. No. 1	2.05	.90	.05	.....	1.10	1.25	.15	.....
Buck. No. 2	1.36	.30	.05	.....	1.01	1.10	.09	.....
Buck. No. 3								
SEPTEMBER, 1901.								
Broken	3.55	2.30	.10	.05	1.10	1.55	.45	.....
Egg	4.22	2.73	.10	.05	1.34	1.55	.21	.....
Stove	4.47	2.90	.10	.05	1.42	1.55	.13	.....
Chestnut	4.48	2.90	.10	.05	1.43	1.55	.12	.....
Pea	2.55	1.34	.05	.....	1.16	1.40	.24	.....
Buck. No. 1	2.14	.91	.05	.....	1.18	1.25	.07	.....
Buck. No. 2	1.30	.30	.05	.....	.95	1.10	.15	.....
Buck. No. 3								

TABLE III—Continued.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Lehigh Valley Railroad to Perth Amboy New York Harbor, f. o. b. Vessel.

Size.	Average price received at Perth Amboy f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Perth Amboy f. o. b.	Deficiency.	Excess.
OCTOBER, 1901.								
Broken	$3.69	$2.31	$0.10	$0.05	$1.23	$1.55	$0.32	.....
Egg	4.23	2.74	.10	.05	1.34	1.55	.21	.....
Stove	4.49	2.91	.10	.05	1.43	1.55	.12	.....
Chestnut	4.48	2.91	.10	.05	1.42	1.55	.13	.....
Pea	2.57	1.33	.05	.....	1.18	1.40	.22	.....
Buck. No. 1	2.17	.91	.05	.....	1.21	1.25	.04	.....
Buck. No. 2	1.36	.30	.05	.....	1.01	1.10	.09	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
NOVEMBER, 1901.								
Broken	3.64	2.28	.10	.05	1.21	1.55	.34	.....
Egg	4.24	2.74	.10	.05	1.35	1.55	.24	.....
Stove	4.49	2.91	.10	.05	1.43	1.55	.12	.....
Chestnut	4.49	2.91	.10	.05	1.43	1.55	.12	.....
Pea	2.51	1.34	.05	.....	1.12	1.40	.28	.....
Buck. No. 1	2.15	.92	.05	.....	1.18	1.25	.07	.....
Buck. No. 2	1.37	.30	.05	.....	1.02	1.10	.08	.....
Buck. No. 3	1.15	.25	.05	.....	.85	1.10	.25	.....
DECEMBER, 1901.								
Broken	3.58	2.31	.10	.05	1.12	1.55	.43	.....
Egg	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Stove	4.47	2.91	.10	.05	1.41	1.55	.14	.....
Chestnut	4.48	2.91	.10	.05	1.42	1.55	.13	.....
Pea	2.40	1.35	.05	.....	1.00	1.40	.40	.....
Buck. No. 1	2.18	.92	.05	.....	1.21	1.25	.04	.....
Buck. No. 2	1.37	.30	.05	.....	1.02	1.10	.08	.....
Buck. No. 3	1.17	.25	.05	.....	.87	1.10	.23	.....

TABLE IV.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Johnston, f. o. b.[1]	Cost Price.[2]	Expense of Selling.[2]	Wastage.[2]	Amount left for Freight.	Published freight rate to Port Johnston, f. o. b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.49	$2.17	$0.10	$0.05	$1.17	$1.55	$0.38	.....
Egg	4.05	2.53	.10	.05	1.37	1.55	.18	.....
Stove	4.42	2.80	.10	.05	1.47	1.55	.08	.....
Chestnut	4.44	2.80	.10	.05	1.49	1.55	.06	.....
Pea	2.49	1.23	.05	.....	1.21	1.40	.19	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	1.41	.30	.05	.....	1.06	1.20	.14	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

[1] Govt. Ex. No. 15, 3 R., 55–59.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Petition, 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 38.

[3] *Supra*, p. 52.

[4] De Forest, 2 R., 651, 654; Govt. Ex. No. 160, 3 R., 383.

TABLE IV—Continued.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Johnston, f. o. b.	Cost Price	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Johnston, f. o. b.	Deficiency.	Excess.
DECEMBER, 1900.								
Broken	$3.44	$2.16	$0.10	$0.05	$0.13	$1.55	$0.42	.....
Egg	4.10	2.54	.10	.05	1.41	1.55	.14	.....
Stove	4.43	2.87	.10	.05	1.41	1.55	.14	.....
Chestnut	4.44	2.88	.10	.05	1.41	1.55	.14	.....
Pea	2.43	1.25	.05	.....	1.13	1.40	.27	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	1.50	.30	.05	.....	1.15	1.20	.05	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JANUARY, 1901.								
Broken	3.30	2.12	.10	.05	1.03	1.55	.52	.....
Egg	4.01	2.53	.10	.05	1.33	1.55	.22	.....
Stove	4.44	2.88	.10	.05	1.41	1.55	.14	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Pea	2.42	1.30	.05	.....	1.07	1.40	.33	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
FEBRUARY, 1901.								
Broken	3.32	2.15	.10	.05	1.02	1.55	.53	.....
Egg	3.95	2.47	.10	.05	1.33	1.55	.22	.....
Stove	4.41	2.88	.10	.05	1.38	1.55	.17	.....
Chestnut	4.42	2.88	.10	.05	1.39	1.55	.16	.....
Pea	2.39	1.28	.05	.....	1.06	1.40	.34	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	1.70	.30	.05	.....	1.35	1.20	.....	$0.15
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MARCH, 1901.								
Broken	3.33	2.16	.10	.05	1.02	1.55	.53	.....
Egg	3.95	2.44	.10	.05	1.36	1.55	.19	.....
Stove	4.41	2.86	.10	.05	1.40	1.55	.15	.....
Chestnut	4.42	2.87	.10	.05	1.40	1.55	.15	.....
Pea	2.35	1.27	.05	.....	1.03	1.40	.37	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
APRIL, 1901.								
Broken	3.38	2.22	.10	.05	1.01	1.55	.54	.....
Egg	3.68	2.40	.10	.05	1.13	1.55	.42	.....
Stove	3.93	2.57	.10	.05	1.21	1.55	.34	.....
Chestnut	3.89	2.56	.10	.05	1.16	1.55	.39	.....
Pea	2.37	1.25	.05	.....	1.07	1.40	.33	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MAY, 1901.								
Broken	3.43	2.25	.10	.05	1.03	1.55	.52	.....
Egg	3.80	2.48	.10	.05	1.17	1.55	.38	.....
Stove	4.05	2.65	.10	.05	1.25	1.55	.30	.....
Chestnut	4.05	2.65	.10	.05	1.25	1.55	.30	.....
Pea	2.35	1.25	.05	.....	1.05	1.40	.35	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JUNE, 1901.								
Broken	3.44	2.27	.10	.05	1.02	1.55	.53	.....
Egg	3.88	2.54	.10	.05	1.19	1.55	.36	.....
Stove	4.14	2.70	.10	.05	1.29	1.55	.26	.....
Chestnut	4.14	2.71	.10	.05	1.28	1.55	.27	.....
Pea	2.32	1.24	.05	.....	1.03	1.40	.37	.....
Buck. No. 1	2.25	.82	.05	.....	1.38	1.20	.....	.18
Buck. No. 2	1.60	.30	.05	.....	1.25	1.20	.....	.05
Buck. No.	.....	.....	.....	.....	.....	.....	.....	.....

TABLE IV—Continued.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessels.

Size.	Average price received at Port Johnston, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Johnston, f. o. b.	Deficiency.	Excess.
JULY, 1901.								
Broken	$3.55	$2.29	$0.10	$0.05	$1.11	$1.55	$0.44	.....
Egg	3.98	2.60	.10	.05	1.23	1.55	.32	.....
Stove	4.22	2.77	.10	.05	1.30	1.55	.25	.....
Chestnut	4.22	2.77	.10	.05	1.30	1.55	.25	.....
Pea	2.55	1.29	.05	.....	1.21	1.40	.19	.....
Buck. No. 1	2.25	.84	.05	.....	1.36	1.20	.....	$0.16
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
AUGUST, 1901.								
Broken	3.49	2.28	.10	.05	1.06	1.55	.49	.....
Egg	4.07	2.66	.10	.05	1.25	1.55	.30	.....
Stove	4.31	2.83	.10	.05	1.33	1.55	.22	.....
Chestnut	4.34	2.84	.10	.05	1.35	1.55	.20	.....
Pea	2.55	1.33	.05	.....	1.17	1.40	.23	.....
Buck. No. 1	2.20	.90	.05	.....	1.25	1.20	.....	.05
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
SEPTEMBER, 1901.								
Broken	3.54	2.30	.10	.05	1.09	1.55	.46	.....
Egg	4.16	2.73	.10	.05	1.28	1.55	.27	.....
Stove	4.42	2.90	.10	.05	1.37	1.55	.18	.....
Chestnut	4.42	2.90	.10	.05	1.37	1.55	.18	.....
Pea	2.55	1.34	.05	.....	1.16	1.40	.24	.....
Buck. No. 1	2.25	.91	.05	.....	1.29	1.20	.....	.09
Buck. No. 2	1.59	.30	.05	.....	1.24	1.20	.....	.04
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
OCTOBER, 1901.								
Broken	3.53	2.31	.10	.05	1.07	1.55	.48	.....
Egg	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Stove	4.44	2.91	.10	.05	1.38	1.55	.17	.....
Chestnut	4.45	2.91	.10	.05	1.39	1.55	.16	.....
Pea	2.58	1.33	.05	.....	1.20	1.40	.20	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
NOVEMBER, 1901.								
Broken	3.49	2.28	.10	.05	1.06	1.55	.49	.....
Egg	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Stove	4.44	2.91	.10	.05	1.38	1.55	.17	.....
Chestnut	4.45	2.91	.10	.05	1.39	1.55	.16	.....
Pea	2.59	1.34	.05	.....	1.20	1.40	.20	.....
Buck. No. 1	2.20	.92	.05	.....	1.23	1.20	.....	.03
Buck. No. 2	1.60	.30	.05	.....	1.25	1.20	.....	.05
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
DECEMBER, 1901.								
Broken	3.55	2.31	.10	.05	1.09	1.55	.46	.....
Egg	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Stove	4.44	2.91	.10	.05	1.38	1.55	.17	.....
Chestnut	4.45	2.91	.10	.05	1.39	1.55	.16	.....
Pea	2.62	1.35	.05	.....	1.22	1.40	.18	.....
Buck. No. 1	2.20	.92	.05	.....	1.23	1.20	.....	.03
Buck. No. 2	1.60	.30	.05	.....	1.25	1.20	.....	.05
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

TABLE V.

Results of 65 per cent contracts of Delaware, Lackawanna & Western Railroad Company, November, 1900, to December, 1901, in respect of coal shipped over its railroad from Wyoming Region to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Hoboken, f. o. b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.30	$2.17	$0.10	$0.05	$0.98	$1.60	$0.62	.....
Egg	3.64	2.53	.10	.05	.95	1.60	.65	.....
Stove	4.08	2.80	.10	.05	1.13	1.60	.47	.....
Chestnut	4.10	2.80	.10	.05	1.15	1.60	.45	.....
Pea	2.48	1.23	.05	.....	1.20	1.60	.40	.....
Buck. No. 1	1.97	.79	.05	.....	1.13	1.60	.47	.....
Buck. No. 2	1.46	.30	.05	.....	1.11	1.60	.49	.....
Buck. No. 3	1.17	.25	.05	.....	.87	1.60	.73	.....
DECEMBER, 1900.								
Broken	3.27	2.16	.10	.05	.96	1.60	.64	.....
Egg	3.95	2.54	.10	.05	1.26	1.60	.34	.....
Stove	4.46	2.87	.10	.05	1.44	1.60	.16	.....
Chestnut	4.46	2.88	.10	.05	1.43	1.60	.17	.....
Pea	2.54	1.25	.05	.....	1.24	1.60	.36	.....
Buck. No. 1	1.99	.77	.05	.....	1.17	1.60	.43	.....
Buck. No. 2	1.41	.30	.05	.....	1.06	1.60	.54	.....
Buck. No. 3	1.11	.25	.05	.....	.81	1.60	.79	.....
JANUARY, 1901.								
Broken	3.22	2.12	.10	.05	.95	1.60	.65	.....
Egg	3.77	2.53	.10	.05	1.09	1.60	.51	.....
Stove	4.42	2.88	.10	.05	1.39	1.60	.21	.....
Chestnut	4.43	2.89	.10	.05	1.39	1.60	.21	.....
Pea	2.82	1.30	.05	.....	1.17	1.60	.43	.....
Buck. No. 1	2.01	.80	.05	.....	1.16	1.60	.44	.....
Buck. No. 2	1.39	.30	.05	.....	1.04	1.60	.56	.....
Buck. No. 3	1.06	.25	.05	.....	.76	1.60	.84	.....
FEBRUARY, 1901.								
Broken	3.39	2.15	.10	.05	1.09	1.60	.51	.....
Egg	3.99	2.47	.10	.05	1.07	1.60	.53	.....
Stove	4.39	2.88	.10	.05	1.36	1.60	.24	.....
Chestnut	4.38	2.88	.10	.05	1.35	1.60	.25	.....
Pea	2.43	1.28	.05	.....	1.10	1.60	.50	.....
Buck. No. 1	2.01	.81	.05	.....	1.15	1.60	.45	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.60	.57	.....
Buck. No. 3	1.08	.25	.05	.....	.78	1.60	.82	.....
MARCH, 1901.								
Broken	3.37	2.16	.10	.05	1.06	1.60	.54	.....
Egg	3.69	2.44	.10	.05	1.10	1.60	.50	.....
Stove	4.35	2.86	.10	.05	1.34	1.60	.26	.....
Chestnut	4.40	2.87	.10	.05	1.38	1.60	.22	.....
Pea	2.18	1.27	.05	.....	.86	1.60	.74	.....
Buck. No. 1	1.91	.81	.05	.....	1.05	1.60	.55	.....
Buck. No. 2	1.39	.30	.05	.....	1.04	1.60	.56	.....
Buck. No. 3	1.10	.25	.05	.....	.80	1.60	.80	.....
APRIL, 1901.								
Broken	3.40	2.22	.10	.05	1.03	1.60	.57	.....
Egg	3.71	2.40	.10	.05	1.16	1.60	.44	.....
Stove	3.98	2.57	.10	.05	1.26	1.60	.34	.....
Chestnut	3.94	2.56	.10	.05	1.23	1.60	.37	.....
Pea	2.44	1.25	.05	.....	1.14	1.60	.46	.....
Buck. No. 1	2.02	.81	.05	.....	1.16	1.60	.44	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.60	.57	.....
Buck. No. 3	1.08	.25	.05	.....	.78	1.60	.82	.....

[1] Govt. Ex. No. 15, 3 R. 58–59.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Petition, 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 38.

[3] *Supra*, p. 52

[4] Govt. Ex. No. 100, 3 R., 382.

TABLE V—Continued.

Results of 65 per cent contracts of Delaware, Lackawanna, & Western Railroad Company, November, 1900, to December, 1901, in respect of coal shipped over its railroad from Wyoming Region to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Hoboken, f. o. b.	Deficiency.	Excess.
MAY, 1901.								
Broken	$3.49	$2.25	$0.10	$0.05	$1.09	$1.60	$0.51	.....
Egg	3.85	2.48	.10	.05	1.23	1.60	.37	.....
Stove	4.09	2.65	.10	.05	1.29	1.60	.31	.....
Chestnut	4.09	2.65	.10	.05	1.29	1.60	.31	.....
Pea	2.46	1.25	.05	.....	1.16	1.60	.44	.....
Buck. No. 1	2.03	.83	.05	.....	1.15	1.60	.45	.....
Buck. No. 2	1.39	.30	.05	.....	1.04	1.60	.56	.....
Buck. No. 3	1.13	.25	.05	.....	.83	1.60	.77	.....
JUNE, 1901.								
Broken	3.48	2.27	.10	.05	1.06	1.60	.54	.....
Egg	3.95	2.54	.10	.05	1.26	1.60	.34	.....
Stove	4.20	2.70	.10	.05	1.35	1.60	.25	.....
Chestnut	4.20	2.71	.10	.05	1.34	1.60	.26	.....
Pea	2.42	1.24	.06	.....	1.13	1.60	.47	.....
Buck. No. 1	1.99	.82	.05	.....	1.12	1.60	.48	.....
Buck. No. 2	1.39	.30	.05	.....	1.04	1.60	.56	.....
Buck. No. 3	1.13	.25	.05	.....	.83	1.60	.77	.....
JULY, 1901.								
Broken	3.48	2.29	.10	.05	1.04	1.60	.56	.....
Egg	4.04	2.60	.10	.05	1.29	1.60	.31	.....
Stove	4.27	2.77	.10	.05	1.35	1.60	.25	.....
Chestnut	4.28	2.77	.10	.05	1.36	1.60	.24	.....
Pea	2.54	1.29	.05	.....	1.20	1.60	.40	.....
Buck. No. 1	2.11	.84	.05	.....	1.22	1.60	.38	.....
Buck. No. 2	1.43	.30	.05	.....	1.08	1.60	.52	.....
Buck. No. 3	1.12	.25	.05	.....	.82	1.60	.78	.....
AUGUST, 1901								
Broken	3.50	2.28	.10	.05	1.07	1.60	.53	.....
Egg	4.13	2.66	.10	.05	1.32	1.60	.28	.....
Stove	4.39	2.83	.10	.05	1.41	1.60	.19	.....
Chestnut	4.40	2.84	.10	.05	1.41	1.60	.19	.....
Pea	2.70	1.33	.05	.....	1.32	1.60	.28	.....
Buck. No. 1	2.11	.90	.05	.....	1.16	1.60	.44	.....
Buck. No. 2	1.40	.30	.05	.....	1.05	1.60	.55	.....
Buck. No. 3	1.12	.25	.05	.....	.82	1.60	.78	.....
SEPTEMBER, 1901.								
Broken	3.51	2.30	.10	.05	1.06	1.60	.54	.....
Egg	4.22	2.73	.10	.05	1.34	1.60	.26	.....
Stove	4.50	2.90	.10	.05	1.45	1.60	.15	.....
Chestnut	4.48	2.90	.10	.05	1.43	1.60	.17	.....
Pea	2.71	1.34	.05	.....	1.32	1.60	.28	.....
Buck. No. 1	2.17	.91	.05	.....	1.21	1.60	.39	.....
Buck. No. 2	1.41	.30	.05	.....	1.06	1.60	.54	.....
Buck. No. 3	1.13	.25	.05	.....	.83	1.60	.77	.....
OCTOBER, 1901.								
Broken	3.53	2.31	.10	.05	1.07	1.60	.53	.....
Egg	4.25	2.74	.10	.05	1.36	1.60	.24	.....
Stove	4.50	2.91	.10	.05	1.44	1.60	.16	.....
Chestnut	4.50	2.91	.10	.05	1.44	1.60	.16	.....
Pea	2.73	1.33	.05	.....	1.35	1.60	.25	.....
Buck. No. 1	2.15	.91	.05	.....	1.19	1.60	.41	.....
Buck. No. 2	1.44	.30	.05	.....	1.08	1.60	.52	.....
Buck. No. 3	1.12	.25	.05	.....	.82	1.60	.78	.....
NOVEMBER, 1901.								
Broken	3.47	2.28	.10	.05	1.04	1.60	.56	.....
Egg	4.23	2.74	.10	.05	1.34	1.60	.26	.....
Stove	4.50	2.91	.10	.05	1.44	1.60	.16	.....
Chestnut	4.50	2.91	.10	.05	1.44	1.60	.16	.....
Pea	2.72	1.34	.05	.....	1.34	1.60	.26	.....
Buck. No. 1	2.20	.92	.05	.....	1.23	1.60	.37	.....
Buck. No. 2	1.40	.30	.05	.....	1.05	1.60	.55	.....
Buck. No. 3	1.12	.25	.05	.....	.82	1.60	.78	.....

TABLE V—Continued.

Results of 65 per cent contracts of Delaware, Lackawanna & Western Railroad Company, November, 1900, to December, 1901, in respect of coal shipped over its railroad from Wyoming Region to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Hoboken, f. o. b.	Deficiency.	Excess.
DECEMBER, 1901.								
Broken	$3.49	$2.31	$0.10	$0.05	$1.03	$1.60	$0.57	.....
Egg	4.25	2.74	.10	.05	1.36	1.60	.24	.....
Stove	4.50	2.91	.10	.05	1.44	1.60	.16	.....
Chestnut	4.49	2.91	.10	.05	1.43	1.60	.17	.....
Pea	2.68	1.35	.05	.....	1.28	1.60	.32	.....
Buck. No. 1	2.22	.92	.05	.....	1.25	1.60	.35	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.60	.57	.....
Buck. No. 3	1.13	.25	.05	.....	.83	1.60	.77	.....

TABLE VI.

Results of 65 Per Cent Contracts of Hillside Coal and Iron Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Erie Railroad to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Weehawken, f.o.b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Weehawken, f.o.b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.42	$2.17	$0.10	$0.05	$1.10	$1.60	$0.50	.....
Egg	3.77	2.53	.10	.05	1.09	1.60	.51	.....
Stove	4.35	2.80	.10	.05	1.40	1.60	.20	.....
Chestnut	4.42	2.80	.10	.05	1.47	1.60	.13	.....
Pea	2.60	1.23	.05	.....	1.32	1.45	.13	.....
Buck. No. 1	2.10	.79	.05	.....	1.26	1.45	.19	.....
Buck. No. 2	1.42	.30	.05	.....	1.07	1.45	.38	.....
Buck. No. 3	1.19	.25	.05	.....	.89	1.45	.56	.....
DECEMBER, 1900.								
Broken	3.20	2.16	.10	.05	.89	1.60	.71	.....
Egg	3.87	2.54	.10	.05	1.18	1.60	.42	.....
Stove	4.41	2.87	.10	.05	1.39	1.60	.21	.....
Chestnut	4.37	2.88	.10	.05	1.34	1.60	.26	.....
Pea	2.75	1.25	.05	.....	1.45	1.45	.....	.....
Buck. No. 1	1.97	.77	.05	.....	1.15	1.45	.30	.....
Buck. No. 2	1.43	.30	.05	.....	1.07	1.45	.38	.....
Buck. No. 3	1.20	.25	.05	.....	.90	1.45	.55	.....
JANUARY, 1901.								
Broken	3.21	2.12	.10	.05	.94	1.60	.56	.....
Egg	3.85	2.53	.10	.05	1.17	1.60	.43	.....
Stove	4.48	2.88	.10	.05	1.45	1.60	.15	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.60	.19	.....
Pea	2.75	1.30	.05	.....	1.40	1.45	.05	.....
Buck. No. 1	2.08	.80	.05	.....	1.23	1.45	.22	.....
Buck. No. 2	1.37	.30	.05	.....	1.02	1.45	.43	.....
Buck. No. 3	1.19	.25	.05	.....	.89	1.45	.56	.....

[1] Govt. Ex. No. 15, 3 R., 55–59.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Petition, 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 38.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 385; Erie R. R. Ex. No. 36, 6 R., 577.

TABLE VI—Continued.

Results of 65 Per Cent Contracts of Hillside Coal and Iron Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Erie Railroad to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Weehawken, f.o.b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Weehawken, f.o.b.	Deficiency.	Excess.
FEBRUARY, 1901.								
Broken	$3.04	$2.15	$0.10	$0.05	$0.74	$1.60	$0.86	.....
Egg	3.51	2.47	.10	.05	.89	1.60	.71	.....
Stove	4.48	2.88	.10	.05	1.45	1.60	.15	.....
Chestnut	4.49	2.88	.10	.05	1.46	1.60	.14	.....
Pea	2.64	1.28	.05	.....	1.31	1.45	.14	.....
Buck. No. 1	2.11	.81	.05	.....	1.25	1.45	.20	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.45	.42	.....
Buck. No. 3	1.18	.25	.05	.....	.88	1.45	.57	.....
MARCH, 1901.								
Broken	3.23	2.16	.10	.05	.92	1.60	.68	.....
Egg	3.47	2.44	.10	.05	.88	1.60	.72	.....
Stove	4.49	2.86	.10	.05	1.48	1.60	.12	.....
Chestnut	4.49	2.87	.10	.05	1.47	1.60	.13	.....
Pea	2.62	1.27	.05	.....	1.30	1.45	.15	.....
Buck. No. 1	2.01	.81	.05	.....	1.15	1.45	.30	.....
Buck. No. 2	1.38	.30	.05	.....	1.03	1.45	.42	.....
Buck. No. 3	1.16	.25	.05	.....	.86	1.45	.59	.....
APRIL, 1901.								
Broken	3.32	2.22	.10	.05	.95	1.60	.65	.....
Egg	3.64	2.40	.10	.05	1.09	1.60	.51	.....
Stove	3.97	2.57	.10	.05	1.25	1.60	.35	.....
Chestnut	3.97	2.56	.10	.05	1.26	1.60	.34	.....
Pea	2.68	1.25	.05	.....	1.38	1.45	.07	.....
Buck. No. 1	1.96	.81	.05	.....	1.10	1.45	.35	.....
Buck. No. 2	1.37	.30	.05	.....	1.02	1.45	.43	.....
Buck. No. 3	1.18	.25	.05	.....	.88	1.45	.57	.....
MAY, 1901.								
Broken	3.39	2.25	.10	.05	1.19	1.60	.41	.....
Egg	3.81	2.48	.10	.05	1.18	1.60	.42	.....
Stove	4.08	2.65	.10	.05	1.28	1.60	.32	.....
Chestnut	4.07	2.65	.10	.05	1.27	1.60	.33	.....
Pea	2.70	1.25	.05	.....	1.40	1.45	.05	.....
Buck. No. 1	2.13	.83	.05	.....	1.25	1.45	.20	.....
Buck. No. 2	1.36	.30	.05	.....	1.01	1.45	.44	.....
Buck. No. 3	1.13	.25	.05	.....	.83	1.45	.62	.....
JUNE, 1901.								
Broken	3.55	2.27	.10	.05	1.13	1.60	.47	.....
Egg	3.92	2.54	.10	.05	1.23	1.60	.37	.....
Stove	4.17	2.70	.10	.05	1.32	1.60	.28	.....
Chestnut	4.16	2.71	.10	.05	1.30	1.60	.30	.....
Pea	2.74	1.24	.05	.....	1.45	1.45	.....	.....
Buck. No. 1	2.15	.82	.05	.....	1.28	1.45	.17	.....
Buck. No. 2	1.36	.30	.05	.....	1.01	1.45	.44	.....
Buck. No. 3	1.14	.25	.05	.....	.84	1.45	.61	.....
JULY, 1901.								
Broken	3.54	2.29	.10	.05	1.10	1.60	.50	.....
Egg	4.00	2.60	.10	.05	1.25	1.60	.35	.....
Stove	4.25	2.77	.10	.05	1.33	1.60	.27	.....
Chestnut	4.25	2.77	.10	.05	1.33	1.60	.27	.....
Pea	2.74	1.29	.05	.....	1.40	1.45	.05	.....
Buck. No. 1	2.17	.84	.05	.....	1.28	1.45	.17	.....
Buck. No. 2	1.47	.30	.05	.....	1.12	1.45	.33	.....
Buck. No. 3	1.15	.25	.05	.....	.85	1.45	.60	.....
AUGUST, 1901.								
Broken	3.54	2.28	.10	.05	1.11	1.60	.49	.....
Egg	4.11	2.66	.10	.05	1.30	1.60	.30	.....
Stove	4.35	2.83	.10	.05	1.37	1.60	.23	.....
Chestnut	4.37	2.84	.10	.05	1.38	1.60	.22	.....
Pea	2.75	1.33	.05	.....	1.37	1.45	.08	.....
Buck. No. 1	2.16	.90	.05	.....	1.21	1.45	.24	.....
Buck. No. 2	1.48	.30	.05	.....	1.13	1.45	.32	.....
Buck. No. 3	1.16	.25	.05	.....	.86	1.45	.59	.....

TABLE VI—Continued.

Results of 65 Per Cent Contracts of Hillside Coal and Iron Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Wyoming Region over Erie Railroad to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Weehawken, f.o.b.	[illegible]	Expence of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Weehawken, f.o.b.	Deficiency.	Excess.
SEPTEMBER, 1901.								
Broken	$3.54	$2.30	$0.10	$0.05	$1.09	$1.60	$0.51	.....
Egg	4.21	2.73	.10	.05	1.33	1.60	.27	.....
Stove	4.46	2.90	.10	.05	1.41	1.60	.19	.....
Chestnut	4.47	2.90	.10	.05	1.42	1.60	.18	.....
Pea	2.74	1.34	.05	.....	1.35	1.45	.10	.....
Buck. No. 1	2.15	.91	.05	.....	1.19	1.45	.26	.....
Buck. No. 2	1.48	.30	.05	.....	1.13	1.45	.32	.....
Buck. No. 3	1.18	.25	.05	.....	.88	1.45	.57	.....
OCTOBER, 1901.								
Broken	3.62	2.31	.10	.05	1.16	1.60	.44	.....
Egg	4.24	2.74	.10	.05	1.35	1.60	.25	.....
Stove	4.51	2.91	.10	.05	1.45	1.60	.15	.....
Chestnut	4.48	2.91	.10	.05	1.42	1.60	.18	.....
Pea	2.74	1.33	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.16	.91	.05	.....	1.20	1.45	.25	.....
Buck. No. 2	1.46	.30	.05	.....	1.11	1.45	.34	.....
Buck. No. 3	1.19	.25	.05	.....	.89	1.45	.56	.....
NOVEMBER, 1901.								
Broken	3.54	2.28	.10	.05	1.11	1.60	.49	.....
Egg	4.23	2.74	.10	.05	1.34	1.60	.26	.....
Stove	4.48	2.91	.10	.05	1.42	1.60	.18	.....
Chestnut	4.48	2.91	.10	.05	1.42	1.60	.18	.....
Pea	2.75	1.34	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.21	.92	.05	.....	1.24	1.45	.21	.....
Buck. No. 2	1.47	.30	.05	.....	1.12	1.45	.32	.....
Buck. No. 3	1.18	.25	.05	.....	.88	1.45	.57	.....
DECEMBER, 1901.								
Broken	3.64	2.31	.10	.05	1.18	1.60	.42	.....
Egg	4.24	2.74	.10	.05	1.35	1.60	.25	.....
Stove	4.49	2.91	.10	.05	1.43	1.60	.17	.....
Chestnut	4.49	2.91	.10	.05	1.43	1.60	.17	.....
Pea	2.68	1.35	.05	.....	1.28	1.45	.17	.....
Buck. No. 1	2.20	.92	.05	.....	1.23	1.45	.22	.....
Buck. No. 2	1.46	.30	.05	.....	1.11	1.45	.34	.....
Buck. No. 3	1.20	.25	.05	.....	.90	1.45	.55	.....

TABLE VII.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Schuylkill Region over Philadelphia & Reading Railway to Port Reading (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Reading f. o. b.[1]	Cost price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for freight	Published freight rate to Port Reading f. o. b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.59	$2.24	$0.10	$0.05	$1.20	$1.55	$0.35	.....
Egg	3.94	2.59	.10	.05	1.20	1.55	.35	.....
Stove	4.42	2.87	.10	.05	1.40	1.55	.15	.....
Chestnut	4.44	2.88	.10	.05	1.41	1.55	.14	.....
Pea	2.49	1.14	.05	.....	1.30	1.40	.10	.....
Buck. No. 1	1.80	.72	.05	.....	1.03	1.20	.17	.....
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
DECEMBER, 1900.								
Broken	3.32	2.16	.10	.05	1.01	1.55	.54	.....
Egg	3.89	2.56	.10	.05	1.16	1.55	.39	.....
Stove	4.34	2.84	.10	.05	1.35	1.55	.20	.....
Chestnut	4.33	2.83	.10	.05	1.35	1.55	.20	.....
Pea	2.47	1.11	.05	.....	1.31	1.40	.09	.....
Buck. No. 1	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JANUARY, 1901.								
Broken	3.59	2.22	.10	.05	1.22	1.55	.33	.....
Egg	3.98	2.60	.10	.05	1.23	1.55	.32	.....
Stove	4.45	2.87	.10	.05	1.43	1.55	.12	.....
Chestnut	4.44	2.87	.10	.05	1.42	1.55	.13	.....
Pea	2.83	1.19	.05	.....	1.59	1.40	.....	$0.19
Buck. No. 1	2.05	.77	.05	.....	1.23	1.26	.....	.03
Buck. No. 2	1.26	.25	.05	.....	.96	1.20	.24	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
FEBRUARY, 1901.								
Broken	3.52	2.29	.10	.05	1.08	1.55	.47	.....
Egg	4.16	2.69	.10	.05	1.32	1.55	.23	.....
Stove	4.46	2.88	.10	.05	1.43	1.55	.12	.....
Chestnut	4.46	2.88	.10	.05	1.43	1.55	.12	.....
Pea	2.80	1.16	.05	.....	1.59	1.40	.....	.19
Buck. No. 1	2.00	.74	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MARCH, 1901.								
Broken	3.67	2.21	.10	.05	1.31	1.55	.24	.....
Egg	4.14	2.66	.10	.05	1.33	1.55	.22	.....
Stove	4.45	2.88	.10	.05	1.42	1.55	.13	.....
Chestnut	4.46	2.89	.10	.05	1.42	1.55	.13	.....
Pea	2.80	1.22	.05	.....	1.53	1.40	.....	.13
Buck. No. 1	2.00	.73	.05	.....	1.22	1.20	.....	.02
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

[1] Govt. Ex. No. 15, 3 R., 55–59.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Schuylkill region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton with 5 cents additional for each 10 cents in advance in price above $1.30 at tide. (Petition, 1 R., 29. 30.) The said general average prices of coal from Schuylkill region are set out in Govt. Ex No. 11, 3 R., 38.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 384.

TABLE VII—Continued.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal and Iron Company, November, 1900, to December, 1901, in respect of Coal Shipped from Schuylkill Region over Philadelphia & Reading Railway to Port Reading (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Reading, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Reading, f. o. b.	Deficiency.	Excess.
APRIL, 1901.								
Broken	$3.46	$2.24	$0.10	$0.05	$1.07	$1.55	$0.48	.....
Egg	3.70	2.40	.10	.05	1.15	1.55	.40	.....
Stove	3.95	2.57	.10	.05	1.23	1.55	.32	.....
Chestnut	3.96	2.57	.10	.05	1.24	1.55	.31	.....
Pea	2.70	1.34	.05	.....	1.31	1.40	.09	.....
Buck. No. 1	2.10	.74	.05	.....	1.31	1.20	.....	$0.11
Buck. No. 2	1.34	.25	.05	.....	1.04	1.20	.16	.....
Buck. No. 3								
MAY, 1901.								
Broken	3.49	2.27	.10	.05	1.07	1.55	.48	.....
Egg	3.81	2.48	.10	.05	1.18	1.55	.37	.....
Stove	4.05	2.63	.10	.05	1.27	1.55	.28	.....
Chestnut	4.05	2.63	.10	.05	1.27	1.55	.28	.....
Pea	2.70	1.29	.05	.....	1.36	1.40	.04	.....
Buck. No. 1	2.10	.80	.05	.....	1.25	1.20	.....	.05
Buck. No. 2	1.45	.30	.05	.....	1.10	1.20	.10	.....
Buck. No. 3								
JUNE, 1901.								
Broken	3.51	2.31	.10	.05	1.05	1.55	.50	.....
Egg	3.90	2.54	.10	.05	1.21	1.55	.34	.....
Stove	4.13	2.69	.10	.05	1.29	1.55	.26	.....
Chestnut	4.15	2.70	.10	.05	1.30	1.55	.25	.....
Pea	2.73	1.25	.05	.....	1.43	1.40	.....	.03
Buck. No. 1	1.97	.79	.05	.....	1.13	1.20	.07	.....
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3								
JULY, 1901.								
Broken	3.51	2.28	.10	.05	1.08	1.55	.47	.....
Egg	4.00	2.60	.10	.05	1.25	1.55	.30	.....
Stove	4.24	2.76	.10	.05	1.33	1.55	.22	.....
Chestnut	4.25	2.76	.10	.05	1.34	1.55	.21	.....
Pea	2.68	1.29	.05	.....	1.34	1.40	.06	.....
Buck. No. 1	2.00	.79	.05	.....	1.16	1.20	.04	.....
Buck. No. 2	1.30	.25	.05	.....	1.00	1.20	.20	.....
Buck. No. 3								
AUGUST, 1901.								
Broker	3.55	2.33	.10	.05	1.07	1.55	.48	.....
Egg	4.11	2.66	.10	.05	1.30	1.55	.25	.....
Stove	4.33	2.82	.10	.05	1.36	1.55	.19	.....
Chestnut	4.35	2.83	.10	.05	1.37	1.55	.18	.....
Pea	2.67	1.34	.05	.....	1.28	1.40	.12	.....
Buck. No. 1	2.07	.82	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.37	.25	.05	.....	1.07	1.20	.13	.....
Buck. No. 3								
SEPTEMBER, 1901.								
Broken	3.54	2.31	.10	.05	1.08	1.55	.47	.....
Egg	4.23	2.74	.10	.05	1.34	1.55	.21	.....
Stove	4.44	2.89	.10	.05	1.40	1.55	.15	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Pea	2.65	1.25	.05	.....	1.35	1.40	.05	.....
Buck. No. 1	2.11	.84	.05	.....	1.22	1.20	.....	.02
Buck. No. 2								
Buck. No. 3								
OCTOBER, 1901.								
Broken	3.62	2.36	.10	.05	1.11	1.55	.44	.....
Egg	4.22	2.74	.10	.05	1.33	1.55	.22	.....
Stove	4.46	2.90	.10	.05	1.41	1.55	.14	.....
Chestnut	4.44	2.90	.10	.05	1.39	1.55	.16	.....
Pea	2.66	1.23	.05	.....	1.38	1.40	.02	.....
Buck. No. 1	2.19	.91	.05	.....	1.23	1.20	.....	.03
Buck. No. 2	1.40	.30	.05	.....	1.05	1.10	.05	.....
Buck. No. 3								

TABLE VII—Continued.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Company, November, 1900, to December, 1901, in Respect of Coal Shipped from Schuylkill Region over Philadelphia & Reading Railway to Port Reading New York Harbor f. o. b. Vessel.

Size.	Average price received at Port Reading, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Reading, f. o. b.	Deficiency.	Excess.
NOVEMBER, 1901.								
Broken	$3.56	$2.32	$0.10	$0.05	$1.09	$1.55	$0.46	.....
Egg	4.22	2.74	.10	.05	1.33	1.55	.22	.....
Stove	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Pea	2.67	1.22	.05	.....	1.40	1.40	.....	.....
Buck. No. 1	2.18	.81	.05	.....	1.32	1.20	.....	$0.12
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
DECEMBER, 1901.								
Broken	3.58	2.32	.10	.05	1.11	1.55	.44	.....
Egg	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Stove	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Pea	2.66	1.26	.05	.....	1.39	1.40	.01	.....
Buck. No. 1	2.18	.81	.05	.....	1.32	1.20	.....	.12
Buck. No. 2	1.40	.30	.05	.....	1.05	1.10	.05	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

TABLE VIII.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Co., November, 1900, to December, 1901, in Respect of Coal Shipped from Schuylkill Region to Philadelphia f. o. b. Vessel.

Size.	Circular price at Phila. f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Phila. f. o. b.[4]	Deficiency.	Excess.
NOVEMBER, 1900.								
Broken	$3.90	$2.24	$0.10	$0.05	$1.51	$1.70	$0.19	.....
Egg	4.15	2.59	.10	.05	1.41	1.70	.29	.....
Stove	4.40	2.87	.10	.05	1.38	1.70	.32	.....
Chestnut	4.40	2.88	.10	.05	1.37	1.70	.33	.....
DECEMBER, 1900.								
Broken	3.90	2.16	0.10	0.05	1.59	1.70	0.11	.....
Egg	4.15	2.56	.10	.05	1.44	1.70	.26	.....
Stove	4.40	2.84	.10	.05	1.41	1.70	.29	.....
Chestnut	4.40	2.83	.10	.05	1.42	1.70	.23	.....

[1] Govt. Ex. No. 194, 3 R., 483.

[2] 65 per cent of general average prices New York Harbor, f. o. b. See Petition Ex. "A," 1 R., 29, 30; and Govt. Ex. No. 11, 3 R., 38.

[3] The record does not disclose the cost of selling nor the wastage on coal shipped to Philadelphia, so we have assumed that these items were the same there as on coal shipped to New York. Eliminating them entirely the amount left for freight during this period would still have been materially less than the published rate.

[4] Ziegler, 2 R., 693.

TABLE VIII—Continued.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Co., November, 1900, to December, 1901, in Respect of Coal Shipped from Schuylkill Region to Philadelphia f. o. b. Vessel.

Size.	Circular price at Phila. f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Phila. f. o. b.	Deficiency.	Excess.
JANUARY, 1901.								
Broken	$3.90	$2.22	$0.10	$0.05	$1.53	$1.70	$0.17	.....
Egg	4.15	2.60	.10	.05	1.40	1.70	.30	.....
Stove	4.40	2.87	.10	.05	1.38	1.70	.32	.....
Chestnut	4.40	2.87	.10	.05	1.38	1.70	.32	.....
FEBRUARY, 1901.								
Broken	3.90	2.29	.10	.05	1.46	1.70	.24	.....
Egg	4.15	2.69	.10	.05	1.31	1.70	.39	.....
Stove	4.40	2.88	.10	.05	1.37	1.70	.33	.....
Chestnut	4.40	2.88	.10	.05	1.37	1.70	.33	.....
MARCH, 1901.								
Broken	3.90	2.31	.10	.05	1.44	1.70	.26	.....
Egg	4.15	2.66	.10	.05	1.34	1.70	.36	.....
Stove	4.40	2.88	.10	.05	1.37	1.70	.33	.....
Chestnut	4.40	2.89	.10	.05	1.36	1.70	.34	.....
APRIL, 1901.								
Broken	3.40	2.24	.10	.05	1.01	1.70	.69	.....
Egg	3.65	2.40	.10	.05	1.10	1.70	.60	.....
Stove	3.90	2.57	.10	.05	1.18	1.70	.52	.....
Chestnut	3.90	2.57	.10	.05	1.18	1.70	.52	.....
MAY, 1901.								
Broken	3.50	2.27	.10	.05	1.08	1.70	.62	.....
Egg	3.75	2.47	.10	.05	1.13	1.70	.57	.....
Stove	4.00	2.63	.10	.05	1.22	1.70	.48	.....
Chestnut	4.00	2.64	.10	.05	1.21	1.70	.49	.....
JUNE, 1901.								
Broken	3.60	2.31	.10	.05	1.14	1.70	.56	.....
Egg	3.85	2.54	.10	.05	1.16	1.70	.54	.....
Stove	4.10	2.69	.10	.05	1.26	1.70	.44	.....
Chestnut	4.10	2.70	.10	.05	1.25	1.70	.45	.....
JULY, 1901.								
Broken	3.70	2.29	.10	.05	1.26	1.70	.44	.....
Egg	3.95	2.60	.10	.05	1.20	1.70	.50	.....
Stove	4.20	2.76	.10	.05	1.29	1.70	.41	.....
Chestnut	4.20	2.76	.10	.05	1.29	1.70	.41	.....
AUGUST, 1901.								
Broken	3.80	2.33	.10	.05	1.32	1.70	.38	.....
Egg	4.05	2.66	.10	.05	1.24	1.70	.46	.....
Stove	4.30	2.82	.10	.05	1.33	1.70	.37	.....
Chestnut	4.30	2.83	.10	.05	1.32	1.70	.38	.....
SEPTEMBER, 1901.								
Broken	3.90	2.31	.10	.05	1.44	1.70	.26	.....
Egg	4.15	2.74	.10	.05	1.26	1.70	.44	.....
Stove	4.40	2.89	.10	.05	1.36	1.70	.34	.....
Chestnut	4.40	2.89	.10	.05	1.36	1.70	.34	.....
OCTOBER, 1901.								
Broken	3.90	2.36	.10	.05	1.39	1.70	.31	.....
Egg	4.15	2.74	.10	.05	1.26	1.70	.44	.....
Stove	4.40	2.90	.10	.05	1.35	1.70	.35	.....
Chestnut	4.40	2.89	.10	.05	1.36	1.70	.34	.....

TABLE VIII—Continued.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Co., November, 1900, to December, 1901, in Respect of Coal Shipped from Schuylkill Region to Philadelphia f. o. b. Vessel.

Size.	Circular price at Phila. f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Phila. f. o. b.	Deficiency.	Excess.
NOVEMBER, 1901.								
Broken	$3.90	$2.32	$0.10	$0.05	$1.43	$1.70	$0.27	.....
Egg	4.05	2.74	.10	.05	1.26	1.70	.44	.....
Stove	4.40	2.89	.10	.05	1.36	1.70	.34	.....
Chestnut	4.40	2.89	.10	.05	1.36	1.70	.34	.....
DECEMBER, 1901.								
Broken	3.90	2.32	.10	.05	1.43	1.70	.27	.....
Egg	4.15	2.73	.10	.05	1.27	1.70	.43	.....
Stove	4.40	2.89	.10	.05	1.36	1.70	.34	.....
Chestnut	4.40	2.89	.10	.05	1.36	1.70	.34	.....

NOTE.—Since it was stated in the brief below of The Philadelphia & Reading Coal & Iron Company that the rate of Philadelphia & Reading Railway Company from the mines to Philadelphia, f. o. b. vessel, on prepared sizes of coal, was not $1.70 per ton during this period as stated in the above table, but 40 cents per ton less, we call attention to the evidence. An examination of the compilation of tariffs of Philadelphia & Reading Railway Company appearing in the record as part of the testimony of Mr. Ziegler, its Comptroller, will show that the reduction of 40 cents, referred to by counsel, did not take effect as a part of its lawful tariff until December 23, 1901, and even then only in respect of shipments "destined to points *beyond* the Capes of the Delaware." (2 R., 693, 696.) Not until August 27, 1906, was there any such deduction in the rate to Philadelphia, f. o. b. vessel, in respect to shipments "destined to points *in Philadelphia Harbor or points inside the Capes of the Delaware.*" (2 R., 698.) Appended to the statement of Mr. Ziegler is a statement of so-called "actual adjustments" by the railway company in respect of the rate to Philadelphia, f. o. b. vessel, on shipments "*outside* the Capes" in the period from March, 1894, to December, 1901. (2 R., 701.) These adjustments, however, were not a part of the lawful published rate. In any event, moreover, they did not apply to shipments destined to points in Philadelphia Harbor or inside the Capes of the Delaware. (2 R., 701.) The copy of the letter, dated April 13, 1889, written by the coal freight agent of the railroad, stating that certain adjustments of the rate to Philadelphia, f. o. b., would be made, referred only to "Coal Tariff No. 13 A," of that year, as appears from Mr. Ziegler's statement (2 R., 692, 701), which tariff had been displaced long before the period covered by this table.

TABLE IX.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company in 1907, in Respect of Coal Shipped from the Wyoming Region over Lehigh Valley Railroad to Perth Amboy (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Perth Amboy, f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Perth Amboy, f. o. b.[4]	Deficiency.	Excess.
JANUARY.								
Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	$0.02
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.94	1.58	.05	.....	1.31	1.40	.09	.....
Buck. No. 1	2.44	1.19	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.57	.50	.05	.....	1.02	1.10	.08	.....
Buck. No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....
FEBRUARY.								
Broken	4.22	2.75	.10	.05	1.32	1.55	.23	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Stove	4.96	3.24	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.89	1.58	.05	.....	1.26	1.40	.14	.....
Buck. No. 1	2.43	1.19	.05	.....	1.19	1.20	.01	.....
Buck. No. 2	1.56	.50	.05	.....	1.01	1.10	.09	.....
Buck. No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....
MARCH.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Stove	4.97	3.24	.10	.05	1.58	1.55	.....	.03
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.91	1.58	.05	.....	1.28	1.40	.12	.....
Buck. No. 1	2.46	1.20	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.55	.50	.05	.....	1.00	1.10	.10	.....
Buck. No. 3	1.35	.25	.05	.....	1.05	1.10	.05	.....

[1] Govt. Ex. No. 15, 3 R., 80-83.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Pet., 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 44.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 386.

TABLE IX—Continued.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company in 1907, in Respect of Coal Shipped from the Wyoming Region over Lehigh Valley Railroad to Perth Amboy (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Perth Amboy, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Perth Amboy, f. o. b.	Deficiency.	Excess.
APRIL.								
Broken	$4.20	$2.74	$0.10	$0.05	$1.31	$1.55	$0.24	.....
Egg	4.45	2.90	.10	.05	1.40	1.55	.15	.....
Stove	4.45	2.91	.10	.05	1.39	1.55	.16	.....
Chestnut	4.45	2.90	.10	.05	1.40	1.55	.15	.....
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	$0.01
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.37	.30	.05	.....	1.02	1.10	.08	.....
MAY.								
Broken	4.20	2.75	.10	.05	1.30	1.55	.25	.....
Egg	4.55	2.96	.10	.05	1.44	1.55	.11	.....
Stove	4.55	2.97	.10	.05	1.43	1.55	.12	.....
Chestnut	4.55	2.96	.10	.05	1.44	1.55	.11	.....
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.39	.30	.05	.....	1.04	1.10	.06	.....
JUNE.								
Broken	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.62	3.02	.10	.05	1.45	1.55	.10	.....
Stove	4.65	3.03	.10	.05	1.47	1.55	.08	.....
Chestnut	4.65	3.02	.10	.05	1.48	1.55	.07	.....
Pea	2.95	1.58	.05	.....	1.32	1.40	.08	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....
JULY.								
Broken	4.24	2.75	.10	.05	1.34	1.55	.21	.....
Egg	4.75	3.08	.10	.05	1.52	1.55	.03	.....
Stove	4.75	3.09	.10	.05	1.51	1.55	.04	.....
Chestnut	4.75	3.09	.10	.05	1.51	1.55	.04	.....
Pea	2.94	1.60	.05	.....	1.29	1.40	.11	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.44	.30	.05	.....	1.09	1.10	.01	.....
AUGUST.								
Broken	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.85	3.16	.10	.05	1.54	1.55	.01	.....
Stove	4.86	3.16	.10	.05	1.55	1.55	.....	.....
Chestnut	4.85	3.16	.10	.05	1.54	1.55	.01	.....
Pea	2.92	1.60	.05	.....	1.27	1.40	.13	.....
Buck. No. 1	2.44	1.19	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.44	.30	.05	.....	1.09	1.10	.01	.....
SEPTEMBER.								
Broken	4.20	2.75	.10	.05	1.30	1.55	.25	.....
Egg	4.95	3.20	.10	.05	1.60	1.55	.....	.05
Stove	4.95	3.21	.10	.05	1.59	1.55	.....	.04
Chestnut	4.95	3.21	.10	.05	1.59	1.55	.....	.04
Pea	2.94	1.61	.05	.....	1.28	1.40	.12	.....
Buck. No. 1	2.44	1.25	.05	.....	1.14	1.20	.06	.....
Buck. No. 2	1.80	.55	.05	.....	1.20	1.10	.....	.10
Buck. No. 3	1.45	.30	.05	.....	1.10	1.10	.....	.....
OCTOBER.								
Broken	4.20	2.75	.10	.05	1.30	1.55	.25	.....
Egg	4.93	3.22	.10	.05	1.56	1.55	.....	.01
Stove	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Chestnut	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Pea	2.94	1.61	.05	.....	1.28	1.40	.12	.....
Buck. No. 1	2.45	1.20	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....

TABLE IX—Continued.

Results of 65 Per Cent Contracts of Lehigh Valley Coal Company in 1907, in Respect of Coal Shipped from the Wyoming Region over Lehigh Valley Railroad to Perth Amboy (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Perth Amboy, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Perth Amboy, f. o. b.	Deficiency.	Excess.
NOVEMBER.								
Broken	$4.26	$2.74	$0.10	$0.05	$1.37	$1.55	$0.18	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	$0.01
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.96	3.23	.10	.05	1.58	1.55	.....	.03
Pea	2.93	1.62	.05	.....	1.26	1.40	.14	.....
Buck. No. 1	2.46	1.25	.05	.....	1.16	1.20	.04	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.41	.30	.05	.....	1.06	1.10	.04	.....
DECEMBER.								
Broken	4.25	2.75	.10	.05	1.35	1.55	.20	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.93	1.65	.05	.....	1.23	1.40	.17	.....
Buck. No. 1	2.45	1.25	.05	.....	1.15	1.20	.05	.....
Buck. No. 2	1.80	.60	.05	.....	1.15	1.10	.....	.05
Buck. No. 3	1.42	.30	.05	.....	1.07	1.10	.03	.....

TABLE X.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company, in 1907, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Johnston f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Port Johnston f. o. b.[4]	Deficiency.	Excess.
JANUARY.								
Broken	$4.20	$2.75	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	$0.01
Stove	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Chestnut	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Pea	2.77	1.58	.05	.....	1.14	1.40	.26	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
FEBRUARY.								
Broken	4.19	2.75	.10	.05	1.29	1.55	.26	.....
Egg	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Stove	4.95	3.24	.10	.05	1.56	1.55	.....	.01
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.75	1.58	.05	.....	1.12	1.40	.28	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	1.80	.50	.05	.....	1.25	1.10	.....	.15
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

[1] Govt. Ex. No. 15, 3 R., 80–83.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Pet., 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 44.

[3] *Supra*, p. 52.

[4] De Forest, 2 R., 651, 654; Govt. Ex. No. 160, 3 R., 383.

TABLE X—Continued.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company; in 1907, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Johnston f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Johnston f. o. b.	Deficiency.	Excess.
MARCH.								
Broken	$4.19	$2.74	$0.10	$0.05	$1.30	$1.55	$0.25	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	$0.01
Stove	4.94	3.24	.10	.05	1.55	1.55	.....	.....
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.77	1.58	.05	.....	1.14	1.40	.26	.....
Buck. No. 1	2..5	1.20	.05	.....	1.20	1.20	.....	.....
Buck. No. 2	1.80	.50	.05	.....	1.25	1.10	.....	.15
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
APRIL.								
Broken	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Egg	4.44	2.90	.10	.05	1.39	1.55	.16	.....
Stove	4.44	2.91	.10	.05	1.38	1.55	.17	.....
Chestnut	4.45	2.90	.10	.05	1.40	1.55	.15	.....
Pea	2.78	1.58	.05	.....	1.15	1.40	.25	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MAY.								
Broken	4.19	2.75	.10	.05	1.29	1.55	.26	.....
Egg	4.53	2.96	.10	.05	1.42	1.55	.13	.....
Stove	4.53	2.97	.10	.05	1.41	1.55	.14	.....
Chestnut	4.53	2.96	.10	.05	1.42	1.55	.13	.....
Pea	2.77	1.58	.05	.....	1.14	1.40	.26	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JUNE.								
Broken	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Egg	4.61	3.02	.10	.05	1.44	1.55	.11	.....
Stove	4.62	3.03	.10	.05	1.44	1.55	.11	.....
Chestnut	4.62	3.02	.10	.05	1.45	1.55	.10	.....
Pea	2.75	1.58	.05	.....	1.12	1.40	.28	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
JULY.								
Broken	4.19	2.75	.10	.05	1.29	1.55	.26	.....
Egg	4.72	3.08	.10	.05	1.49	1.55	.06	.....
Stove	4.71	3.09	.10	.05	1.41	1.55	.08	.....
Chestnut	4.72	3.09	.10	.05	1.48	1.55	.07	.....
Pea	2.94	1.60	.05	.....	1.29	1.40	.11	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
AUGUST.								
Broken	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Egg	4.82	3.16	.10	.05	1.51	1.55	.04	.....
Stove	4.82	3.16	.10	.05	1.51	1.55	.04	.....
Chestnut	4.82	3.16	.10	.05	1.51	1.55	.04	.....
Pea	2.94	1.60	.05	.....	1.29	1.40	.11	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.20	.....	.01
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
SEPTEMBER.								
Broken	4.19	2.75	.10	.05	1.29	1.55	.26	.....
Egg	4.90	3.20	.10	.05	1.55	1.55	.....	.....
Stove	4.90	3.21	.10	.05	1.54	1.55	.01	.....
Chestnut	4.89	3.21	.10	.05	1.53	1.55	.02	.....
Pea	2.96	1.61	.05	.....	1.30	1.40	.10	.....
Buck. No. 1	2.47	1.25	.05	.....	1.17	1.20	.03	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

TABLE X—Continued.

Results of 65 Per Cent Contracts of Lehigh & Wilkes-Barre Coal Company, in 1907, in Respect of Coal Shipped from Wyoming Region over Central Railroad of New Jersey to Port Johnston (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Johnston f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Johnston f. o. b.	Deficiency.	Excess.
OCTOBER.								
Broken	$4.19	$2.75	$0.10	$0.05	$1.29	$1.55	$0.26	.....
Egg	4.94	3.22	.10	.05	1.57	1.55	.....	.02
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	2.96	1.61	.05	.....	1.30	1.40	.10	.....
Buck. No. 1	2.54	1.20	.05	.....	1.29	1.20	.....	.09
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
NOVEMBER.								
Broken	4.19	2.74	.10	.05	1.30	1.55	.25	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Stove	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Chestnut	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Pea	2.99	1.62	.05	.....	1.32	1.40	.08	.....
Buck. No. 1	2.56	1.25	.05	.....	1.26	1.20	.....	.06
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
DECEMBER.								
Broken	4.19	2.75	.10	.05	1.29	1.55	.26	.....
Egg	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Stove	4.94	3.23	.10	.05	1.56	1.55	.....	.01
Chestnut	4.95	3.23	.10	.05	1.57	1.55	.....	.02
Pea	3.02	1.65	.05	.....	1.32	1.40	.08	.....
Buck. No. 1	2.57	1.25	.05	.....	1.27	1.20	.....	.07
Buck. No. 2	1.95	.60	.05	.....	1.30	1.10	.....	.20
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

TABLE XI.

Results of 65 Per Cent Contracts of Delaware, Lackawanna & Western Railroad Company, in 1907, in Respect of Coal Shipped from Wyoming Region over Delaware, Lackawanna & Western Railroad to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.[1]	Cost Price.[2]	Expense of Selling.[2]	Wastage.[2]	Amount left for Freight.	Published freight rate to Hoboken, f. o. b.[4]	Deficiency.	Excess.
JANUARY.								
Broken	$4.23	$2.75	$0.10	$0.05	$1.33	$1.58	$0.25	.....
Egg	5.00	3.23	.10	.05	1.62	1.58	.....	$0.04
Stove	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.13	.....	.17
Buck. No. 3	1.40	.25	.05	.....	1.10	1.13	.03	.....

[1] Govt. Ex. No. 15, 3 R., 80-83.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b. with 2 per cent additional for each 10 cents advance in such price above $2: sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Pet. I. R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 44.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 382.

TABLE XI—Continued.

Results of 65 per Cent Contracts of Delaware, Lackawanna & Western Railroad Company, in 1907, in Respect of Coal Shipped from Wyoming Region over Delaware, Lackawanna & Western Railroad to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Hoboken. f. o. b.	Deficiency.	Excess.
FEBRUARY.								
Broken	$4.25	$2.75	$0.10	$0.05	$1.35	$1.58	$0.23	.....
Egg	5.00	3.23	.10	.05	1.62	1.58	.....	$0.04
Stove	5.00	3.24	.10	.05	1.61	1.58	.....	.03
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.13	.....	.17
Buck. No. 3	1.40	.25	.05	.....	1.10	1.13	.03	.....
MARCH.								
Broken	4.25	2.74	.10	.05	1.36	1.58	.22	.....
Egg	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Stove	5.00	3.24	.10	.05	1.61	1.58	.....	.03
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.20	.05	.....	1.25	1.28	.03	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.13	.....	.17
Buck. No. 3	1.40	.25	.05	.....	1.10	1.13	.03	.....
APRIL.								
Broken	4.23	2.74	.10	.05	1.34	1.58	.24	.....
Egg	4.49	2.90	.10	.05	1.44	1.58	.14	.....
Stove	4.50	2.91	.10	.05	1.44	1.58	.14	.....
Chestnut	4.50	2.90	.10	.05	1.45	1.58	.13	.....
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	1.94	.55	.05	.....	1.34	1.13	.....	.21
Buck. No. 3	1.43	.30	.05	.....	1.08	1.13	.05	.....
MAY.								
Broken	4.25	2.75	.10	.05	1.35	1.58	.23	.....
Egg	4.60	2.96	.10	.05	1.49	1.58	.09	.....
Stove	4.60	2.97	.10	.05	1.48	1.58	.10	.....
Chestnut	4.60	2.96	.10	.05	1.49	1.58	.09	.....
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.13	.....	.27
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.....	.02
JUNE.								
Broken	4.27	2.74	.10	.05	1.38	1.58	.20	.....
Egg	4.70	3.02	.10	.05	1.53	1.58	.05	.....
Stove	4.70	3.03	.10	.05	1.52	1.58	.06	.....
Chestnut	4.70	3.02	.10	.05	1.53	1.58	.05	.....
Pea	3.00	1.58	.05	.....	1.37	1.43	.06	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	1.93	.55	.05	.....	1.33	1.13	.....	.20
Buck. No. 3	1.43	.30	.05	.....	1.08	1.13	.05	.....
JULY.								
Broken	4.27	2.75	.10	.05	1.37	1.58	.21	.....
Egg	4.77	3.08	.10	.05	1.54	1.58	.04	.....
Stove	4.79	3.09	.10	.05	1.55	1.58	.03	.....
Chestnut	4.80	3.09	.10	.05	1.56	1.58	.02	.....
Pea	3.00	1.60	.05	.....	1.35	1.43	.08	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.13	.....	.27
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.....	.02
AUGUST.								
Broken	4.25	2.74	.10	.05	1.36	1.58	.22	.....
Egg	4.89	3.16	.10	.05	1.58	1.58	.....	.....
Stove	4.89	3.16	.10	.05	1.58	1.58	.....	.....
Chestnut	4.90	3.16	.10	.05	1.59	1.58	.....	.01
Pea	3.00	1.60	.05	.....	1.35	1.43	.08	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.28	.02	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.13	.....	.27
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.02	.....

TABLE XI—Continued.

Results of 65 Per Cent Contracts of Delaware, Lackawanna & Western Railroad Company, in 1907, in Respect of Coal Shipped from Wyoming Region over Delaware, Lackawanna & Western Railroad to Hoboken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Hoboken, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Hoboken, f. o. b.	Deficiency.	Excess.
SEPTEMBER.								
Broken	$4.26	$2.75	$0.10	$0.05	$1.36	$1.58	$0.22	.....
Egg	4.97	3.20	.10	.05	1.62	1.58	.....	$0.04
Stove	4.99	3.21	.10	.05	1.63	1.58	.....	.05
Chestnut	4.98	3.21	.10	.05	1.62	1.58	.....	.04
Pea	3.04	1.61	.05	.....	1.38	1.43	.05	.....
Buck. No. 1	2.50	1.25	.05	.....	1.20	1.28	.08	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.13	.....	.27
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.....	.02
OCTOBER.								
Broken	4.25	2.75	.10	.05	1.35	1.58	.23	.....
Egg	5.00	3.22	.10	.05	1.63	1.58	.....	.05
Stove	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.06	1.61	.05	.....	1.40	1.43	.03	.....
Buck. No. 1	2.50	1.20	.05	.....	1.25	1.28	.03	.....
Buck. No. 2	2.03	.60	.05	.....	1.38	1.13	.....	.25
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.....	.02
NOVEMBER.								
Broken	4.25	2.74	.10	.05	1.36	1.58	.22	.....
Egg	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Stove	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.01	1.62	.05	.....	1.34	1.43	.09	.....
Buck. No. 1	2.50	1.25	.05	.....	1.20	1.28	.08	.....
Buck. No. 2	2.01	.60	.05	.....	1.36	1.13	.....	.23
Buck. No. 3	1.52	.30	.05	.....	1.17	1.13	.....	.04
DECEMBER.								
Broken	4.27	2.75	.10	.05	1.37	1.58	.21	.....
Egg	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Stove	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Chestnut	5.00	3.23	.10	.05	1.62	1.58	.....	.04
Pea	3.03	1.65	.05	.....	1.33	1.43	.10	.....
Buck. No. 1	2.50	1.25	.05	.....	1.20	1.28	.08	.....
Buck. No. 2	2.01	.60	.05	.....	1.36	1.13	.....	.23
Buck. No. 3	1.50	.30	.05	.....	1.15	1.13	.....	.02

TABLE XII.

Results of 65 Per Cent Contracts of Hillside Coal & Iron Company, in 1907, in Respect of Coal Shipped from the Wyoming Region over Erie Railroad to Weehawken (New York Harbor), f. o. b. Vessel.

Size.	Average price received at Weehawken, f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Weehawken. f. o. b.[4]	Deficiency.	Excess.
JANUARY.								
Broken	$4.27	$2.75	$0.10	$0.05	$1.37	$1.60	$0.23	.....
Egg	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Stove	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Chestnut	4.99	3.23	.10	.05	1.61	1.60	.....	$0.01
Pea	2.90	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.45	1.19	.05	.....	1.21	1.30	.09	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.15	.....	.15
Buck. No. 3	1.39	.25	.05	.....	1.09	1.15	.06	.....
FEBRUARY.								
Broken	4.30	2.75	.10	.05	1.40	1.60	.20	.....
Egg	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Stove	4.98	3.24	.10	.05	1.59	1.60	.01	.....
Chestnut	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Pea	2.90	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.15	.....	.15
Buck. No. 3	1.39	.25	.05	.....	1.09	1.15	.06	.....
MARCH.								
Broken	4.26	2.74	.10	.05	1.37	1.60	.23	.....
Egg	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Stove	4.99	3.24	.10	.05	1.60	1.60	.....	.....
Chestnut	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Pea	2.99	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.50	1.20	.05	.....	1.25	1.30	.05	.....
Buck. No. 2	1.85	.50	.05	.....	1.30	1.15	.....	.15
Buck. No. 3	1.40	.25	.05	.....	1.10	1.15	.05	.....
APRIL.								
Broken	4.24	2.74	.10	.05	1.35	1.60	.25	.....
Egg	4.47	2.90	.10	.05	1.42	1.60	.18	.....
Stove	4.48	2.91	.10	.05	1.42	1.60	.18	.....
Chestnut	4.48	2.90	.10	.05	1.43	1.60	.17	.....
Pea	2.99	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	1.98	.55	.05	.....	1.38	1.15	.....	.23
Buck. No. 3	1.48	.30	.05	.....	1.13	1.15	.02	.....
MAY.								
Broken	4.21	2.75	.10	.05	1.31	1.60	.29	.....
Egg	4.56	2.96	.10	.05	1.45	1.60	.15	.....
Stove	4.56	2.97	.10	.05	1.44	1.60	.16	.....
Chestnut	4.55	2.96	.10	.05	1.44	1.60	.16	.....
Pea	2.99	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.15	.....	.25
Buck. No. 3	1.50	.30	.05	.....	1.15	1.15	.....	.....
JUNE.								
Broken	4.25	2.74	.10	.05	1.36	1.60	.24	.....
Egg	4.66	3.02	.10	.05	1.49	1.60	.11	.....
Stove	4.66	3.03	.10	.05	1.48	1.60	.12	.....
Chestnut	4.65	3.02	.10	.05	1.48	1.60	.12	.....
Pea	2.99	1.58	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.15	.....	.25
Buck. No. 3	1.50	.30	.05	.....	1.15	1.15	.....	.....

[1] Govt. Ex. No. 15, 3 R., 80-83.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b. with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Pet., 1 R., 29, 30.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 44.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 385; Erie R. R. Ex. No. 36, 6 R., 577.

TABLE XII—Continued.

Results of 65 Per Cent Contracts of Hillside Coal & Iron Company, in 1907, in Respect of Coal Shipped from the Wyoming Region over Erie Railroad to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Weehawken, f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Weehawken, f. o. b.	Deficiency.	Excess.
JULY.								
Broken	$4.25	$2.75	$0.10	$0.05	$1.35	$1.60	$0.25	.....
Egg	4.74	3.08	.10	.05	1.51	1.60	.09	.....
Stove	4.75	3.09	.10	.05	1.51	1.60	.09	.....
Chestnut	4.74	3.09	.10	.05	1.50	1.60	.10	.....
Pea	2.99	1.60	.05	.....	1.34	1.45	.11	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.15	.....	$0.25
Buck. No. 3	1.50	.30	.05	.....	1.15	1.15	.....	.....
AUGUST.								
Broken	4.34	2.74	.10	.05	1.35	1.60	.25	.....
Egg	4.87	3.16	.10	.05	1.56	1.60	.04	.....
Stove	4.87	3.16	.10	.05	1.56	1.60	.04	.....
Chestnut	4.87	3.15	.10	.05	1.56	1.60	.04	.....
Pea	2.99	1.60	.05	.....	1.34	1.45	.11	.....
Buck. No. 1	2.50	1.19	.05	.....	1.26	1.30	.04	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.15	.....	.25
Buck. No. 3	1.50	.30	.05	.....	1.15	1.15	.....	.....
SEPTEMBER.								
Broken	4.28	2.75	.10	.05	1.38	1.60	.22	.....
Egg	4.94	3.20	.10	.05	1.59	1.60	.01	.....
Stove	4.95	3.21	.10	.05	1.59	1.60	.01	.....
Chestnut	4.94	3.21	.10	.05	1.58	1.60	.02	.....
Pea	3.02	1.61	.05	.....	1.36	1.45	.09	.....
Buck. No. 1	2.54	1.25	.05	.....	1.24	1.30	.06	.....
Buck. No. 2	2.00	.55	.05	.....	1.40	1.15	.....	.25
Buck. No. 3	1.51	.30	.05	.....	1.16	1.15	.....	.01
OCTOBER.								
Broken	4.27	2.75	.10	.05	1.37	1.60	.23	.....
Egg	4.97	3.22	.10	.05	1.60	1.60	.....	.....
Stove	4.97	3.23	.10	.05	1.59	1.60	.01	.....
Chestnut	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Pea	3.03	1.61	.05	.....	1.37	1.45	.08	.....
Buck. No. 1	2.52	1.20	.05	.....	1.27	1.30	.03	.....
Buck. No. 2	2.00	.60	.05	.....	1.35	1.15	.....	.20
Buck. No. 3	1.51	.30	.05	.....	1.16	1.15	.....	.01
NOVEMBER.								
Broken	4.27	2.74	.10	.05	1.38	1.60	.22	.....
Egg	4.97	3.23	.10	.05	1.59	1.60	.01	.....
Stove	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Chestnut	4.99	3.23	.10	.05	1.61	1.60	.....	.01
Pea	3.05	1.62	.05	.....	1.38	1.45	.07	.....
Buck. No. 1	2.51	1.25	.05	.....	1.21	1.30	.09	.....
Buck. No. 2	2.01	.60	.05	.....	1.36	1.15	.....	.21
Buck. No. 3	1.52	.30	.05	.....	1.17	1.15	.....	.02
DECEMBER.								
Broken	4.28	2.75	.10	.05	1.38	1.60	.22	.....
Egg	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Stove	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Chestnut	4.98	3.23	.10	.05	1.60	1.60	.....	.....
Pea	3.05	1.65	.05	.....	1.35	1.45	.10	.....
Buck. No. 1	2.52	1.25	.05	.....	1.22	1.30	.08	.....
Buck. No. 2	2.01	.60	.05	.....	1.36	1.15	.....	.21
Buck. No. 3	1.50	.30	.05	.....	1.15	1.15	.....	.....

TABLE XIII.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Company, 1907, in Respect of Coal Shipped from Schuylkill Region over Philadelphia & Reading Railway to Port Reading (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Reading f. o. b.[1]	Cost Price.[2]	Expense of Selling.[3]	Wastage.[3]	Amount left for Freight.	Published freight rate to Port Reading f. o. b.[4]	Deficiency.	Excess.
JANUARY.								
Broken	$4.20	$2.74	$0.10	$0.05	$1.31	$1.55	$0.24	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	$0.03
Stove	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Chestnut	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Pea	2.85	1.49	.05	.....	1.31	1.40	.09	.....
Buck. No. 1	2.35	1.07	.05	.....	1.23	1.25	.02	.....
Buck. No. 2	1.45	.30	.05	.....	1.10	1.15	.05	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
FEBRUARY.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Stove	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Chestnut	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Pea	2.85	1.49	.05	.....	1.31	1.40	.09	.....
Buck. No. 1	2.35	1.07	.05	.....	1.23	1.25	.02	.....
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MARCH.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.96	3.22	.10	.05	1.59	1.55	.....	.04
Stove	4.97	3.22	.10	.05	1.60	1.55	.....	.05
Chestnut	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Pea	2.86	1.50	.05	.....	1.31	1.40	.14	.....
Buck. No. 1	2.35	1.01	.05	.....	1.29	1.25	.....	.04
Buck. No. 2	1.45	.30	.05	.....	1.10	1.15	.05	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
APRIL.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Stove	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Chestnut	4.45	2.89	.10	.05	1.41	1.55	.14	.....
Pea	2.95	1.54	.05	.....	1.36	1.40	.04	.....
Buck. No. 1	2.44	1.06	.05	.....	1.33	1.25	.....	.08
Buck. No. 2	.....	.....	.....	.....	.....	.....	.....	.....
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
MAY.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.53	2.95	.10	.05	1.43	1.55	.12	.....
Stove	4.53	2.95	.10	.05	1.43	1.55	.12	.....
Chestnut	4.53	2.95	.10	.05	1.43	1.55	.12	.....
Pea	2.92	1.49	.05	.....	1.38	1.40	.02	.....
Buck. No. 1	2.44	.99	.05	.....	1.40	1.25	.....	.15
Buck. No. 2	1.70	.45	.05	.....	1.20	1.15	.....	.05
Buck. No. 3	.....	.25	.....	.....	.....	.....	.....	.....
JUNE.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.64	3.02	.10	.05	1.47	1.55	.08	.....
Stove	4.65	3.02	.10	.05	1.48	1.55	.07	.....
Chestnut	4.65	3.02	.10	.05	1.48	1.55	.07	.....
Pea	2.90	1.50	.05	.....	1.35	1.40	.05	.....
Buck. No. 1	2.42	.99	.05	.....	1.38	1.25	.....	.13
Buck. No. 2	1.71	.45	.05	.....	1.21	1.15	.....	.06
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....

[1] Govt. Ex. No. 15, 3 R., 80–83.

[2] Prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Schuylkill region; pea, 50 per cent general average price New York Harbor f. o. b., with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b., with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton, with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (Pet., 1 R., 29, 30.) The said general average prices of coal from Schuylkill region are set out in Govt. Ex. No. 11, 3 R., 44.

[3] *Supra*, p. 52.

[4] Govt. Ex. No. 160, 3 R., 384.

TABLE XIII—Continued.

Results of 65 Per Cent Contracts of Philadelphia & Reading Coal & Iron Company, 1907, in Respect of Coal Shipped from Schuylkill Region over Philadelphia & Reading Railway to Port Reading (New York Harbor) f. o. b. Vessel.

Size.	Average price received at Port Reading f. o. b.	Cost Price.	Expense of Selling.	Wastage.	Amount left for Freight.	Published freight rate to Port Reading f. o. b.	Deficiency.	Excess.
JULY.								
Broken	$4.21	$2.74	$0.10	$0.05	$1.32	$1.55	$0.23	.....
Egg	4.74	3.08	.10	.05	1.51	1.55	.04	.....
Stove	4.74	3.08	.10	.05	1.51	1.55	.04	.....
Chestnut	4.74	3.08	.10	.05	1.51	1.55	.04	.....
Pea	2.89	1.49	.05	.....	1.35	1.40	.05	.....
Buck. No. 1	2.43	.98	.05	.....	1.40	1.25	.....	$0.15
Buck. No. 2	1.71	.45	.05	.....	1.21	1.15	.....	.06
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
AUGUST.								
Broken	4.20	2.74	.10	.05	1.31	1.55	.24	.....
Egg	4.84	3.15	.10	.05	1.54	1.55	.01	.....
Stove	4.84	3.15	.10	.05	1.54	1.55	.01	.....
Chestnut	4.84	3.15	.10	.05	1.54	1.55	.01	.....
Pea	2.88	1.50	.05	.....	1.33	1.40	.07	.....
Buck. No. 1	2.44	1.07	.05	.....	1.32	1.25	.....	.07
Buck. No. 2	1.70	.45	.05	.....	1.20	1.15	.....	.05
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
SEPTEMBER.								
Broken	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Stove	4.94	3.21	.10	.05	1.58	1.55	.....	.03
Chestnut	4.94	3.21	.10	.05	1.58	1.55	.....	.03
Pea	2.90	1.52	.05	.....	1.33	1.40	.07	.....
Buck. No. 1	2.42	1.08	.05	.....	1.29	1.25	.....	.04
Buck. No. 2	1.71	.45	.05	.....	1.21	1.15	.....	.06
Buck. No. 3	.....	.....	.....	.....	.....	.....	.....	.....
OCTOBER.								
Broken	4.21	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Stove	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Chestnut	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Pea	2.92	1.53	.05	.....	1.34	1.40	.06	.....
Buck. No. 1	2.43	1.14	.05	.....	1.24	1.25	.01	.....
Buck. No. 2	1.70	.45	.05	.....	1.20	1.15	.....	.05
Buck. No. 3	1.45	.30	.05	.....	1.10	1.15	.05	.....
NOVEMBER.								
Broken	4.20	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Stove	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Chestnut	4.94	3.21	.10	.05	1.58	1.55	.....	.03
Pea	2.91	1.53	.05	.....	1.33	1.40	.07	.....
Buck. No. 1	2.42	1.08	.05	.....	1.29	1.25	.....	.04
Buck. No. 2	1.70	.45	.05	.....	1.20	1.15	.....	.05
Buck. No. 3	1.46	.30	.05	.....	1.11	1.15	.04	.....
DECEMBER.								
Broken	4.20	2.74	.10	.05	1.32	1.55	.23	.....
Egg	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Stove	4.95	3.22	.10	.05	1.58	1.55	.....	.03
Chestnut	4.94	3.21	.10	.05	1.58	1.55	.....	.03
Pea	2.91	1.53	.05	.....	1.33	1.40	.07	.....
Buck. No. 1	2.41	1.08	.05	.....	1.28	1.25	.....	.03
Buck. No. 2	1.70	.45	.05	.....	1.20	1.15	.....	.05
Buck. No. 3	1.45	.30	.05	.....	1.10	1.15	.05	.....

TABLE XIV.

Results in 1907 of the 65 Per Cent Contract between Hillside Coal & Iron Company and Delaware & Hudson Company in Respect of Coal Shipped to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Tons purchased and shipped to Weehawken, f. o. b.[1]	Average selling price per ton received there for at Weehawken, f. o. b.[2]	Cost price per ton.[3]	Expense of selling per ton.[4]	Wastage per ton.[5]	Amount left per ton to pay Freight.	Published freight rate per ton to Weehawken, f. o. b.[6]	Deficiency per ton.	Total deficiency on each size, assuming entire amount shipped was sold in same month.[7]	Total deficiency for the month on all sizes.
JANUARY.										
Broken	14,700	$4.30	$2.75	$0.15	$0.05	$1.35	$1.60	$0.25	$3,675.00	
Egg	15,069	5.00	3.23	.15	.05	1.57	1.60	.03	452.07	
Stove	21,824	5.00	3.23	.15	.05	1.57	1.60	.03	654.72	
Chestnut	15,323	5.00	3.23	.15	.05	1.57	1.60	.03	459.69	
Pea	18,572	3.00	1.58	.10	.....	1.32	1.45	.13	2,414.36	
Buckwheat	12,270	2.50	1.19	.10	.....	1.21	1.30	.09	1,104.30	
										$8,760.14
FEBRUARY.										
Broken	12,372	4.33	2.75	.15	.05	1.38	1.60	.22	2,721.84	
Egg	9,889	5.00	3.23	.15	.05	1.57	1.60	.03	296.67	
Stove	19,847	5.00	3.24	.15	.05	1.56	1.60	.04	793.88	
Chestnut	12,629	5.00	3.23	.15	.05	1.57	1.60	.03	378.87	
Pea	18,439	3.00	1.58	.10	.....	1.32	1.45	.13	2,397.07	
Buckwheat	9,994	2.50	1.19	.10	.....	1.21	1.30	.09	894.96	
										7,483.29
MARCH.										
Broken	12,113	4.29	2.74	.15	.05	1.35	1.60	.25	3,028.25	
Egg	11,784	5.00	3.23	.15	.05	1.57	1.60	.03	353.52	
Stove	21,262	5.00	3.24	.15	.05	1.56	1.60	.04	850.48	
Chestnut	13,426	5.00	3.23	.15	.05	1.57	1.60	.03	402.78	
Pea	16,419	3.00	1.58	.10	.....	1.32	1.45	.13	2,134.47	
Buckwheat	10,534	2.50	1.20	.10	.....	1.20	1.30	.10	1,053.40	
										7,822.90
APRIL.										
Broken	14,642	4.25	2.74	.15	.05	1.31	1.60	.29	4,246.18	
Egg	14,258	4.50	2.90	.15	.05	1.40	1.60	.20	2,851.60	
Stove	25,613	4.50	2.91	.15	.05	1.39	1.60	.21	5,378.73	
Chestnut	18,004	4.50	2.90	.15	.05	1.40	1.60	.20	3,600.80	
Pea	19,863	3.00	1.58	.10	.....	1.32	1.45	.13	2,582.19	
Buckwheat	14,723	2.50	1.19	.10	.....	1.21	1.30	.09	1,325.07	
										19,984.57
MAY.										
Broken	17,811	4.27	2.75	.15	.05	1.32	1.60	.28	4,987.08	
Egg	17,576	4.59	2.96	.15	.05	1.43	1.60	.17	2,987.92	
Stove	28,537	4.58	2.97	.15	.05	1.41	1.60	.19	5,422.03	
Chestnut	19,895	4.58	2.96	.15	.05	1.42	1.60	.18	3,581.10	
Pea	21,003	3.00	1.58	.10	.....	1.32	1.45	.13	2,730.39	
Buckwheat	13,800	2.50	1.20	.10	.....	1.20	1.30	.10	1,380.00	
										21,088.52
JUNE.										
Broken	14,175	4.27	2.74	.15	.05	1.33	1.60	.27	3,827.25	
Egg	11,013	4.68	3.02	.15	.05	1.46	1.60	.14	1,541.82	
Stove	21,189	4.68	3.03	.15	.05	1.45	1.60	.15	3,178.35	
Chestnut	14,496	4.68	3.02	.15	.05	1.46	1.60	.14	2,029.44	
Pea	17,248	3.00	1.58	.10	.....	1.32	1.45	.13	2,242.24	
Buckwheat	11,630	2.50	1.20	.10	.....	1.20	1.30	.10	1,163.00	
										13,982.10

[1] Govt. Ex. No. 147, 3 R., 303.

[2] Govt. Ex. No. 148, 3 R., 306.

[3] For prepared sizes, 65 per cent general average price New York Harbor f. o. b. of coal from Wyoming region; pea, 50 per cent general average price New York Harbor f. o. b., with 1 per cent additional for each 10 cents advance in such price above $2.50; buckwheat No. 1, 40 per cent general average price New York Harbor f. o. b., with 2 per cent additional for each 10 cents advance in such price above $2; sizes below buckwheat No. 1, 25 cents per ton with 5 cents additional for each 10 cents advance in price above $1.30 at tide. (See Ans., D. & H. Co., 1 R., 156.) The said general average prices of coal from Wyoming region are set out in Govt. Ex. No. 11, 3 R., 44.

[4] Richardson, 2 R., 141.

[5] Richardson, 2 R., 140.

[6] Richardson, 2 R., 142.

[7] The great bulk of the coal shipped in a given month is sold in that month. Blauvelt, 2 R., 426.

TABLE XIV—Continued.

Results in 1907 of the 65 Per Cent Contract between Hillside Coal & Iron Company and Delaware & Hudson Company in Respect of Coal Shipped to Weehawken (New York Harbor) f. o. b. Vessel.

Size.	Tons purchased and shipped to Weehawken, f. o. b.	Average selling price per ton received therefor at Weehawken, f. o. b.	Cost price per ton.	Expense of selling per ton.	Wastage per ton.	Amount left per ton to pay Freight.	Published freight rate per ton to Weehawken, f. o. b.	Deficiency per ton.	Total deficiency on each size, assuming entire amount shipped was sold in same month.	Total deficiency for the month on all sizes.
JULY.										
Broken	15,820	$4.27	$2.75	$0.15	$0.05	$1.32	$1.60	$0.28	$4,429.62	
Egg	10,896	4.79	3.08	.15	.05	1.51	1.60	.09	980.64	
Stove	19,729	4.79	3.09	.15	.05	1.50	1.60	.10	1,972.90	
Chestnut	6,504	4.78	3.09	.15	.05	1.49	1.60	.11	715.44	
Pea	15,555	3.00	1.60	.10	.....	1.30	1.45	.15	2,333.25	
Buckwheat	11,783	2.50	1.19	.10	.....	1.21	1.30	.09	1,060.47	
										$11,492.32
AUGUST.										
Broken	16,770	4.26	2.74	.15	.05	1.32	1.60	.28	4,695.60	
Egg	4,808	4.90	3.16	.15	.05	1.54	1.60	.06	288.48	
Stove	9,971	4.90	3.16	.15	.05	1.54	1.60	.06	598.26	
Chestnut	7,345	4.90	3.16	.15	.05	1.54	1.60	.06	440.70	
Pea	15,258	3.00	1.60	.10	.....	1.30	1.45	.15	2,288.70	
Buckwheat	15,406	2.50	1.19	.10	.....	1.21	1.30	.09	1,386.54	
										9,698.28
SEPTEMBER.										
Broken	14,987	4.28	2.75	.15	.05	1.33	1.60	.27	4,046.49	
Egg	10,956	4.98	3.20	.15	.05	1.58	1.60	.02	219.12	
Stove	20,603	4.98	3.21	.15	.05	1.57	1.60	.03	618.09	
Chestnut	8,551	4.98	3.21	.15	.05	1.57	1.60	.03	256.53	
Pea	17,472	3.04	1.61	.10	.....	1.33	1.45	.12	2,096.64	
Buckwheat	19,680	2.56	1.26	.10	.....	1.20	1.30	.10	1,968.00	
										9,204.87
OCTOBER.										
Broken	7,493	4.29	2.75	.15	.05	1.34	1.60	.26	1,948.18	
Egg	7,450	5.00	3.22	.15	.05	1.58	1.60	.02	149.00	
Stove	14,689	5.00	3.23	.15	.05	1.57	1.60	.03	440.67	
Chestnut	11,390	5.00	3.23	.15	.05	1.57	1.60	.03	341.70	
Pea	11,821	3.03	1.61	.10	.....	1.32	1.45	.13	1,536.73	
Buckwheat	8,143	2.53	1.20	.10	.....	1.23	1.30	.07	570.01	
										4,986.29
NOVEMBER.										
Broken	5,060	4.32	2.74	.15	.05	1.38	1.60	.22	1,113.20	
Egg	4,597	5.00	3.23	.15	.05	1.57	1.60	.03	137.91	
Stove	10,904	5.00	3.23	.15	.05	1.57	1.60	.03	327.12	
Chestnut	9,167	5.00	3.23	.15	.05	1.57	1.60	.03	275.01	
Pea	7,466	3.02	1.61	.10	.....	1.31	1.45	.14	1,045.24	
Buckwheat	6,569	2.53	1.25	.10	.....	1.18	1.30	.12	788.28	
										3,686.76
DECEMBER.										
Broken	12,535	4.32	2.75	.15	.05	1.37	1.60	.23	2,883.05	
Egg	4,861	5.00	3.23	.15	.05	1.57	1.60	.03	145.83	
Stove	9,127	5.00	3.23	.15	.05	1.57	1.60	.03	273.81	
Chestnut	7,391	5.00	3.23	.15	.05	1.57	1.60	.03	221.73	
Pea	13,333	3.01	1.65	.10	.....	1.26	1.45	.19	2,533.27	
Buckwheat	13,823	2.51	1.26	.10	.....	1.15	1.30	.15	2,073.45	
										8,131.14
Grand total	.....	.....	.....	.....	.....	.....	.....	.....	.....	126,321.18

The question, When are railroads competitive? has been considered in the following cases:

Louisville & Nashville R. R. v. *Behlmer*, 175 U. S., 648; *Louisville & Nashville R. R.* v. *Kentucky*, 161 U. S., 677; *County of Leavenworth* v. *Chicago, &c., R. R. Co.*, 25 Fed., 219; *Kimball* v. *Atchison, &c., R. R.*, 46 Fed., 888; *Rodgers* v. *Nashville, &c., R. R.*, 91 Fed., 299, 318; *East St. Louis, &c., R. R.* v. *Jarvis*, 92 Fed., 743; *Dady* v. *Georgia, &c., R. R.*, 112 Fed., 838; *United States* v. *Union Pacific R. Co. et al.*, 188 Fed., 102; *State* v. *Vanderbilt*, 37 Ohio St., 590; *Hafer* v. *Cincinnati, &c., R. R. Co.*, 29 Cin. Law Bul., 68; s. c. 4 Ohio dec., 487; *Burke* v. *Cleveland, etc., R. R.*, 21 Weekly Law Bul. (Ohio), 11; s. c. 10 Ohio dec. (reprint), 525; *Board of Tippecanoe Co.* v. *Lafayette, &c., R. Co.*, 50 Ind., 85, 113; *East Line, &c., R. R. Co.* v. *Rushing*, 69 Tex., 306 (6 S. W., 834); *East Line, &c., R. R.* v. *State*, 75 Tex., 434 (12 S. W., 690); *Gulf, &c., R. R. Co.* v. *State*, 72 Tex., 410 (10 S. W., 81); *People* v. *Boston, &c., R. R.*, 12 Abb., N. C. (N. Y.), 230; *People* v. *O'Brien*, 111 N. Y., 1, 64; *Currier* v. *Concord, &c., R. R. Co.*, 48 N. H., 321; *Morrill* v. *Railroad*, 55 N. H., 531; *Manchester, &c.*, v. *Concord, &c., R. R.*, 66 N. H., 131; *Central R. R. Co.* v. *Pennsylvania R. R. Co.*, 31 N. J., Eq., 475; *Elkins* v. *Camden, &c., R. R.*, 36 N. J., Eq., 5; *Stockton* v. *Central R. R. Co.*, 50 N. J., Eq., 52, 489; *Ill. State Trust Co.* v. *St. Louis, &c., R. R.*, 208 Ill., 419 (70 N. E., 357); 217 Ill., 514 (75 N. E., 562); *Chicago & M. Electric R. R.* v. *Chicago & N. W. R. R.*, 211 Ill., 352

(71 N. E., 1017); *State* v. *Terminal Ass'n of St. Louis*, 182 Mo., 284 (81 S. W., 395); *The Yazoo, &c., R. R.* v. *Southern R. R.*, 83 Miss., 746; *State* v. *Atchison, &c., R. R.*, 24 Neb., 164 (38 N. W., 43); *State* v. *Atchison, &c.*, 38 Neb., 437; *State* v. *Montana R. R.*, 53 Pac., 623 (45 L. R. A., 271); *Pennsylvania R. R.* v. *Commonwealth*, 7 Atl., 368; *Pennsylvania R. R.* v. *Commonwealth*, 7 Atl., 374; *Cumberland, &c.*, v. *Gettysburg R. R.*, 177 Pa., 519; *State* v. *Central R. R. of Ga.*, 35 S. E., 37; *Hawkinsville, &c., R. R.* v. *Waycross Air Line R. R.*, 39 S. E., 844; *Collins* v. *Central R. R. of Ga.*, 40 Ga., 582; *Ga. Pacific R. R.* v. *Gaines*, 88 Ala., 381 (7 S. Rep., 382); *Eel River Railroad* v. *State*, 57 N. E. (Ind.), 388.

APPENDIX C.

LAWS PROHIBITING UNION OF PARALLEL *OR* COMPETING RAILROADS.

Arkansas, Const., 1874, Art. 17, Sec. 4; Stats., Kirby's Dig., Sec. 6741.

California, Civil Code, Kerr's, Sec. 465.

Colorado, Const., 1876, Art. 15, Sec. 5; Stats., Mills's, 1891, Sec. 604; Rev. Sup., 1891–1905, Secs. 611, 612–a.

Connecticut, Gen. Stats., 1902, Sec. 3674.

Florida, Gen. Stats., 1906, Sec. 2812.

Georgia, Const., 1877, Art. 4, Sec. 2, Par. 4; Code, 1895, Secs. 2173, 2179.

Idaho, Code, 1909, Sec. 2800.

Illinois, Const., 1870, Art. 11, Sec. 11; Rev. Stats., Hurd's, 1908, Ch. 114, Secs. 39, 47.

Iowa, Sup. Code, 1907, Sec. 2038–b.

Kansas, Gen. Stats., 1909, Sec. 7013, 7016.

Kentucky, Const., 1891, Sec. 201.

Louisiana, Rev. Laws, 1904, pp. 1484, 1485.

Maryland, Pub. Gen. Laws, 1904, Art. 23, Sec. 265.

Michigan, Const., 1908, Art. XII, Sec. 8; Comp. Laws, 1897, Vol. 2, p. 1964, Sec. 29.

Minnesota, Rev. Laws, 1905, Sec. 2896.

Mississippi, Code, 1906, Secs. 4057, 4089, 4090.

Missouri, Const., 1875, Art. 12, Sec. 17; Anno. Stats., 1906, Secs. 1062, 1063.

Montana, Const., Art. XV, Sec. 6; Rev. Code, Secs. 4292, 4293.

Nebraska, Const., 1875, Art. 11, Sec. 3.

New Mexico, Comp. Laws, 1897, Sec. 3892.

New York, Cons. Laws, 1909, Vol. 4, p. 4786, Sec. 80.

North Dakota, Const., Art. 7, Sec. 141; Rev. Code, 1905, Sec. 4273.

Ohio, Rev. Stats., Bates's, 1908, Sec. 3379; *State* v. *Vanderbilt* (37 Ohio St., 590).

Oklahoma, Const., Art. IX, Sec. 8.

Oregon, Stats., Bellinger & Cotton's, 1902, Sec. 5056.

Pennsylvania, Const., 1873, Art. 17, Sec. 4; Laws, Brightly's Dig., 1903, p. 740, Sec. 22.

South Carolina, Const., 1895, Art. 9, Sec. 7; Civil Code, 1902, Secs. 2050, 2060.

South Dakota, Const., 1889, Art. 17, Sec. 14; Civil Code, Secs. 494, 495; Comp. Laws, 1908, Vol. 2; Civil Code, pp. 60, 61.

Tennessee, Code, 1896, Sec. 1490.

Texas, Const., 1876, Art. 10, Sec. 5; Civil Stats., Sayles's Art. 4529.

Utah, Const., 1895, Art. 12, Sec. 13; Comp. Laws, 1907, Ch. 11, Sec. 434.

Washington, Const., 1889, Art. 12, Sec. 16; Code, Pierce's, 1905, Sec. 7802; Laws, 1909, Ch. 196.

West Virginia, Const., 1872, Art. 11, Sec. 11; Code, 1906, Secs. 2346, 2468.

Wisconsin, Stats., Sanborn and Berryman's Sup. 1906, p. 920, Sec. 1833.

Wyoming, Const., 1889, Art. 10, Sec. 8.

○

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
OCT 7 1911
JAMES H. McKENNEY
CLERK

No. ~~477~~. 198

THE UNITED STATES,
Appellant

v.

READING COMPANY ET AL.

No. ~~480~~. 206

THE TEMPLE IRON COMPANY,
Appellant,

v.

THE UNITED STATES.

No. ~~504~~. 217

READING COMPANY ET AL.,
Appellant,

v.

THE UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE LEHIGH AND WILKES-BARRE COAL COMPANY.

ROBERT W. DE FOREST,
JACKSON E. REYNOLDS,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

THE UNITED STATES, Appellant, v. READING COMPANY *et al.*	No. 477.
THE TEMPLE IRON COMPANY, Appellant, v. THE UNITED STATES.	No. 485.
READING COMPANY *et al.*, Appellants, v. THE UNITED STATES.	No. 504.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA.

Brief for the Central Railroad Company of New Jersey and the Lehigh & Wilkes-Barre Coal Company.

Statement.

The only points which will be discussed in this brief are those brought in issue by the original

pleadings in this case as particularly affecting the Central Railroad Company of New Jersey or The Lehigh & Wilkes-Barre Coal Company, about nine-tenths of whose share capital is and has been owned by the railroad company for many years past. These points are only those raised by the specific prayers in the petition asking for relief as against these above-named defendants.

These prayers as numbered and lettered in the petition are as follows, to-wit: That it may be adjudged and decreed:

FIRST (*a*).—That the defendants have entered into a combination to restrain trade and commerce in anthracite coal among the several states, and have monopolized and attempted to monopolize a part of such trade and commerce in violation of the provisions of the Act of July 2, 1890, and (*b*) that they be forever enjoined from continuing, or in any manner acting under or in pursuance of the aforesaid combination or conspiracy, and from continuing to monopolize or attempting to monopolize any part of such trade and commerce.

SECOND (*a*).—That the so-called 65% purchase contracts for coal be declared illegal and (*b*) that the said contracts be canceled.

FOURTH (*c*).—That the Central Railroad Company of New Jersey be enjoined from permitting its stock held by the Reading Company to be voted by the Reading Company and from paying any dividends to the said Reading Company, etc.

FIFTH (*c*).—That the Central Railroad Company of New Jersey be enjoined from voting the stock in the Temple Iron Company which it owns and from exercising any control over the acts and doings of the said Temple Iron Company, by virtue of its holdings of stock therein.

Of the foregoing prayers this brief will refrain from any discussion of the so-called Temple Iron Company phase or the Reading Company holding of stock in the Central Railroad Company of New Jersey, and out of consideration for the Court, counsel will content themselves with referring to and adopting the briefs filed by the Temple Iron Company and the Reading Company, respectively.

This elimination, therefore, leaves only two broad questions for discussion, and these may be described briefly as the General Conspiracy, and the so-called Sixty-five per cent. Contracts.

The General Conspiracy.

The brief of counsel for the United States, so far as it relates to these two defendants to which alone this brief pertains, depends upon misrepresentation of important portions of the record and deliberate quotation of testimony condemned by the Circuit Court for the Eastern District of Pennsylvania for any appearance of proof of this allegation against these defendants. This is a serious charge to make against eminent counsel in a great cause acting for the sovereign United States, but the charge will be shown to be true. Furthermore, this misrepresentation is studied, deliberate and inexcusable, because in the briefs filed and oral arguments made in the Circuit Court, the attention of counsel for the petitioner was directed to them—and yet they are reiterated here.

For example, as showing the truth of the allegation that the defendants on the record collectively monopolized a great percentage of available anthracite coal, and that the Central Railroad practically monopolizes the coal on its line, counsel for the petitioner print on page 30 of their brief a

table and footnote stating unequivocally that the Lehigh Coal & Navigation Company is a "subsidiary or affiliated coal company of the Central Railroad Company of New Jersey" and is to be considered in that light precisely as the Lehigh & Wilkes-Barre Coal Company, and that together these two companies owned and controlled by contract 877,569,700 tons of coal in the ground, or 17.30 per cent. of the toal unmined coal, and that this coal had a prospect of lasting 163 years according to estimates made in 1895. The same theme is elaborated at page 40 of petitioner's brief, and on page 48 another table contains the barefaced statement that there was shipped over the Central Railroad Company of New Jersey's lines 7,699,261 tons of coal by its affiliated coal company (or 88.35%) of total shipments in the year 1907, and this again included the shipments of the Lehigh Coal & Navigation Company. The Government's own testimony and exhibits will show that three-sevenths of this total were shipped by the Lehigh Coal & Navigation Company.

Now, if it true, as the counsel for petitioner represent, that the Lehigh Coal & Navigation Company is a subsidiary and affiliated coal company of the Central Railroad Company of New Jersey, why is it not proceeded against in this court as a defendant and a conspirator? The Government petition and briefs are so drawn as to convey the impression that this Lehigh Coal & Navigation Company coal is under the hand of the conspirator, the Central Railroad Company of New Jersey. The brief has an easy suggestive "glide" on this and similar difficult points to carry it over rough places. It makes a considerable difference to swell the amount of coal controlled by this defendant by adding the coal of such a large company not a defendant.

The point is, that the Lehigh Coal & Navigation

Company is independent in fact and in law. It is not even made party defendant. The Government, the witnesses, and the facts are alike to the effect that it is independent. The Government law officers have so decided. We know this by their petition and the amendments thereto. Of course, it was their sworn duty under the statute to join all real conspirators as defendants. To find out who were such conspirators they had over 5,000 pages of testimony and 200 exhibits in the Hearst case; 10,000 pages of testimony and multitudes of exhibits, in the Coal Strike case, and 788 closely printed pages of evidence and exhibits in Labor Troubles in the Anthracite Regions in 1887 and 1888, from which they obtained the testimony of Mr. Harris given in 1886, not to mention many other sources, from which they did and could inform themselves. The petition and the case show they fully considered such sources of information, and decided that the Lehigh Coal & Navigation Company was not so owned, or controlled, or connected with, the alleged conspirator, The Central Railroad Company of New Jersey, by stock ownership, or acts, as to warrant the United States law officers in charging them with being in an unlawful combination, or being conspirators, or making them defendants.

It is apparent, therefore, that the government counsel realize now, and always have realized, that such parties as were omitted as defendants in the beginning, are not parties to any unlawful combination, or conspiracy. This takes out the Lehigh Coal & Navigation Company, as parties to an unlawful combination or conspiracy, and makes them in fact and law independent thereof.

The facts about that Company are that by the government's own evidence it appeared that it is an old and powerful independent company, having $19,000,000 capital stock, $17,000,000 bonded debt (Lathrop, 2 R., 72); owning its own canal to Phila-

delphia, built in 1823, over which it still ships about 150,000 tons of coal a year, also coal and freight for other shippers, all at a loss of $39,000 a year, however. (Lathrop, 2 R., pp. 72, 83 & 87.) A large amount of its stock is for sale by trustees at $135 per $50 shares (Lathrop, 2 R., 72). The stock ownership also shows it to be independent, according to counsels' own view, for it is owned by individuals, not railroad companies (Lathrop, 2 R., 47). Because it built several railroads which it was wise enough to afterwards lease for good rentals, and for no other reason apparently, unless that it first leased some to the Central of New Jersey in 1871 (3 R., Ex. A, p. 8), and has modified and continued these leases ever since (Gov. Ex. 2, R. 3, pp. 2 to 23), the government speaks of the Lehigh Coal & Navigation Company as if it were a "partner" with the Central of New Jersey. Such is not the fact. The Lehigh Coal & Navigation Company agrees to send all but 25% of its coal to market over the leased road, but as the "maximum" rental to be paid was long since reached (Lathrop, 2 R., 76) any plausible relation, partnership has ceased to exist, and that covenant does not now have any bearing on this case. The route leased being the most direct to tide, and the rate as low as the others, all tide coal of course moves that route. There is, therefore, nothing in the "partner" claim, and no reason for treating it as anything but the independent company it is. It has 13,783 acres of coal lands (Gov. Ex. 1, 3 R., p. 1), eight mines (Lathrop, 2 R., 73), and produced about 3,000,000 tons out of 67,000,000 in 1907, or between 4% and 5% of all the coal produced (Lathrop, 2 R., 77).

Such facts show it is, as it always has been, an independent producer. It is not in any way under "restraint" by "contract," or otherwise, by this defendant in producing, marketing or selling its coal.

At page 60 of their brief, counsel for the petitioner treat as among "The Facts Established" the existence of a pooling compact in 1896, and quote as if it were proper testimony in support of that fact in this case certain statements made before the Interstate Commerce Commission (and filed as Government Exhibit No. 159, 3 R., 377, 378) by a Mr. Walter. On page 176 counsel deliberately reiterates this statement. At page 226 they make other reference to the Walter statement. On page 364 counsel referring to this alleged testimony as "none of it vital" state that the Circuit Court did not rule out this evidence, after referring to the fact that a motion had been made by the defendants to strike it from the record. In juxtaposition with this statement by the counsel for the petitioner is the contrary statement of Mr. Justice Gray, who said apropos of the motion to strike out this testimony and the argument on that motion:

> "*The objection to the admission* of the copy *of Mr. Walter's testimony*, as taken before the Interstate Commerce Commission, *must be sustained.* It is testimony taken before a body not judicial but administrative, in a proceeding between different parties, and with reference to nonidentical issues. It is not authenticated or proven by any witness present at the time the testimony was taken. It is, therefore, not within the rules permitting the testimony of a witness taken in one proceeding to be used in another. The inclusion of this testimony in the record is to be regretted, as it is embarrassing to the Court in considering the weight and effect of all the testimony on either side. It may be said that the testimony, as far as its substance goes, is in the same line with the other testimony on the part of the petitioner; but the barriers between what is competent and incompetent as testimony, cannot be broken down without creating confusion and exposing liti-

> gants to dangers from which they have a right to be protected." United States *v.* Reading Co. *et al.*, 183 Fed. Rep., 427, at 442.

Mr. Justice Buffington restricted his discussion of the case to the Temple Iron Company and the sixty-five per cent. contracts specifically, and concurred in the Court's dismissal of the bill as to the other matters (183 Fed. Rep., 459). Mr. Justice Lanning said as to these motions to strike out the exhibits and testimony: "It is not necessary to pass upon this motion for the reason that, whether the proofs be in or out, the conclusions expressed in this opinion, at least, will remain the same" (183 Fed. Rep., p. 476).

Under such circumstances is it quite compatible with the dignity of government counsel to state among "The Facts Established" such discredited testimony?

The ingenious brief of counsel for the United States, by an artificial juxtaposition of unrelated facts extending back more than thirty-three years, many of which took place before the "Sherman Act" was first conceived, has created an artificial atmosphere of suspicion which is made to distort ordinary business transactions, and even inexorable economic laws, into proofs of "combination" and "conspiracy."

It is only when this atmosphere has been dissipated by eliminating such short lived and abortive incidents as the "combination of 1876," antedating by fourteen years the enactment of the Sherman Act, by analyzing the evidence relating to each defendant subsequent to that date, distinguishing inference from fact, separating that proved as to one from that proved as to others, and applying the facts proved respecting each individual defendant to the relief demanded against it, that clear

vision is restored and the parties are seen in their normal position and in their relation to each other.

The only basis for any present injunction is that there is affirmative proof of some now-existent "combination" or "conspiracy." What any of the parties did, or tried to do, in 1876, or in later years, prior certainly to 1890, and are not doing now, is irrelevant to any present issue.

The evidence respecting this alleged combination of 1876 appearing in the printed testimony, at pages 341 to 343, and the Government Exhibit No. 152, are not rightfully in this case at all, as they precede not only the alleged combination on which this defendant was brought before the bar in the present case, but precede likewise the enactment of the Anti-Trust Act by fourteen years. Furthermore, the exhibit in question contains intrinsic evidence of its irrelevancy, incompetency and its general immaterial character. The document likewise shows on its face that the understanding was to exist only for and during the year 1876. It is wholly *res inter alios acta* and can have no bearing or effect upon the parties to this controversy in this suit. The evidence further refers to nothing alleged in the pleadings and is therefore improperly considered in this case.

The alleged combination of 1892 between the Philadelphia and Reading Railroad Company and the Central Railroad Company of New Jersey, was sought to be proved by a lease of the Jersey Central to the Port Reading Railroad Company, a New Jersey corporation controlled by the Reading. It was set aside by the Chancellor of New Jersey in the suit of Stockton, Att'y. Gen'l. *v.* Central Railroad Company of New Jersey *et al.*, 50 N. J. Equity, 52, eighteen years ago, and is no proof of any existent situation.

The Chancellor held that this lease was *ultra vires* on the part of the Jersey Central because

made in effect to the Reading Company, a foreign corporation. True, the allegation that this lease tended to a monopoly in coal and to increase the cost of coal to citizens of New Jersey, was an inducement to the Chancellor to grant an injunction, but the reason for his granting an injunction was "to prevent a corporate excess of power."

The full syllabus in this case, showing that it turned on the question of *ultra vires,* is as follows:

> "1. A corporation, created by statute, possesses no rights and can exercise no powers which are not expressly given or to be necessarily implied.
>
> 2. Such a corporation cannot lease or dispose of any franchise needful in the performance of its obligations to the state, without legislative consent.
>
> 3. The act of March 11th, 1880, which amends the seventeenth section of the act entitled 'An Act to authorize the formation of railroad corporations and to regulate the same (Rev., p. 930), is free from constitutional infirmities in its title and is sufficiently broad in its terms to confer power upon railroad corporations chartered by special law.
>
> 4. The act of May 2d, 1885, entitled 'An act respecting the leasing of railroads,' is unconstitutional.
>
> 5. Equity looks at the substance, and will disregard names and penetrate disguises of form, to discover and deal with it.
>
> 6. Where a corporate excess of power tends to the public injury or to defeat public policy, it may be restrained in equity at the suit of the Attorney-General.
>
> 7. A railroad company of this state leased its franchises and roads to a railway corporation of another state. The lease was not only unauthorized, but was expressly forbidden by law. Its effect was to combine coal producers and carriers and to partially destroy competition in the production

and sale of anthracite coal, a staple commodity of the state.

Held, to be a corporate excess of power which tends to monopoly and the public injury."

The alleged pooling compact of 1896 appears to be the only basis for the Government's assertion, otherwise unsupported by any evidence, that there existed in 1895 a general conspiracy and combination in violation of the Anti-Trust Law. Practically the only support of any such allegation is derived from the testimony of Mr. Alfred Walter in 1896, in the suit before the Interstate Commerce Commission entitled Hearst *vs.* The Philadelphia and Reading Railway, and filed in the instant case as Government Exhibit No. 159. At the time Mr. Walter testified he was not connected with any of the defendants on this record, and therefore his testimony was not admissible in this case on any ground such as an admission against the interest of a party to this record. The Government sought to introduce this testimony in this present case on the theory that Mr. Walter being dead the record in the other case became admissible in this one. Under no system of jurisprudence known to counsel was that testimony admissible. To make it thus admissible four things would be necessary: first, that the testimony should be properly authenticated or proven by some witness present in the court at the time Mr. Walter testified and testifying to the correctness of the record; second, the testimony should have been given in a court where the defendant would have had opportunity to test the accuracy of the testimony by proper cross-examination and restrict the evidence to relevant and competent testimony by proper objection; third, the parties to the litigation in which the testimony was given should have been the same as the parties to the present litigation, and fourth,

the issue in the case in which the testimony was given should have been identical with the issue in the present case. None of these four prerequisites to the admission of this testimony in this case was satisfied by the evidence. Therefore, the Walter testimony must be entirely disregarded, and without that testimony there is no proof of this alleged pooling compact of 1896.

The fate of this alleged testimony in the Circuit Court has already been referred to above.

As respects the acquisition by the Reading Company of Jersey Central stock, the Jersey Central had no corporate relation whatsoever. It is alleged to have been brought about by an agreement between the Reading Company and "the then owners and holders, unknown to the Petitioner, of a large majority of the shares of the capital stock of the * * * Central Railroad Company of New Jersey." (Petition, p. 20.) The brief in this case is entirely consistent with the allegations of the petition, and demonstrates conclusively that the entity, the Central Railroad Company of New Jersey, was entirely passive and that whatever was accomplished was so accomplished without corporate action, and that the result could not have been prevented or influenced by anything that this defendant could do or refrain from doing. Under such circumstances defendant feels that it is not only unnecessary, but that it would be inconsiderate of the time and attention of this Court to duplicate the general discussion of this question as covered in the brief of the Reading Company. Counsel therefore content themselves with a reference to the brief filed in behalf of the Reading Company, and adopt what is there said respecting this transaction.

It should be noted, however, that the relation between the Reading and the Central, as two connecting railroads, and as dependent upon each

other for traffic between New York and Philadelphia, and between New York and western points *via* the old Allentown Line, is a connection mutually advantageous to the two companies and to the public, which dates back to the early seventies and before, long anterior to any suggestion of coal combination. The connection is the natural result of the extension of through lines of traffic and has no relation to the development of the anthracite coal fields. The Allentown Line to the West, existing in the sixties and later, used the Jersey Central from New York and the Reading from Allentown. This antedated any Philadelphia connection. The New York and Philadelphia new line, opened in 1876, included the Jersey Central from New York to Bound Brook, thence over the Delaware & Bound Brook to the Delaware, and thence over the Northern Pennsylvania Railroad into Philadelphia. The Reading in the late seventies acquired the Northern Pennsylvania and the Delaware and Bound Brook, and the original tripartite agreement of the three roads between New York and Philadelphia became an agreement between the Reading and the Jersey Central. The relation between these two connecting railroads, so important to each, naturally encouraged a closer alliance. The first alliance of this form took place in 1883, when the Reading Railroad Company leased the Jersey Central. This first lease was terminated by the insolvency of the Reading, as well as by litigation in New Jersey which denied the corporate power of the Jersey Central to lease to a foreign railroad company. The relation of the two roads then reverted to its former basis of traffic agreement. The lease of 1892 to the Port Reading Railroad Company hereinbefore alluded to, set aside because *ultra vires* on the part of the Jersey Central, was another attempt to give legal form to a natural business connection.

The purchase of Jersey Central stock by the Reading was the latest form in which the interdependence of the two railroads as connecting roads was recognized.

In Petitioner's brief there is one gratuitous assumption of counsel which is not only unwarranted, but improper, and that is the constant assertion that the rates on anthracite coal from mines to tide (*via* the Central Railroad among others) are unreasonable, extortionate, etc. No such thing has been proved in this case and no such thing could be proved in this case. The only proper forum in which to debate that proposition under the present organization of Federal powers is the Interstate Commerce Commission, and until that Commission has declared this defendant's rates to be unreasonable and extortionate this Court must assume *arguendo*, that the published rates are reasonable. Thus in Texas and Pacific Railway *v.* Abilene Cotton Oil Company, 204 U. S., 426, Mr. Justice White said, at pages 441, 447 and 448:

> "Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on the complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. * * *
>
> "The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without pre-

vious action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute.

"Concluding, as we do, that a shipper seeking reparation, predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce."

The Government discusses a purchase in the past by the Central Railroad Company of New Jersey of some of the shares of the Lehigh Valley Railroad. It is a fact that the Jersey Central bought some of the stock of the Lehigh Valley. It is also a fact that all of this stock has since been sold. No charge is made in the petition in relation to this stock and no relief is sought.

The argument of counsel for the Government also urges the proposition that the interests of the defendant railroad companies in anthracite coal lands, and in coal mining and producing companies, acquired since January 1, 1874, are held in violation of Article XVII, Section 5 of the constitution of the State of Pennsylvania. What materiality this proposition has to the present case is difficult to see, except to create the artificial atmosphere of suspicion which is raised by the Government's brief. And that suspicion would seem to be allayed by the fact that thirty-six years have elapsed since the adoption of that constitution, and no attempt has ever been made by the

State of Pennsylvania, the only Government which has the right to enforce that constitution, to assert any claim under it against these defendants. This new constitution certainly has no materiality so far as the Jersey Central is concerned, for its indirect relations with the coal lands of the Lehigh & Wilkes-Barre Coal Company were created previous to its adoption. The emphasis laid on this clause of the constitution of 1874 by counsel for the United States serves, however, to call attention to the long continued relations between these companies, and to the fact that these relations embody a public policy which they were organized to carry out under the then constitution of Pennsylvania, which was quite different from that which finds expression in the new constitution, and that in carrying out this policy they are only acting in obedience to the constitution and laws of Pennsylvania under which the relations were brought into being. This is material, for if it is by reason of exercising the powers lawfully given to these companies, and performing the duties lawfully imposed upon them, and entering into relations lawfully incident to these powers and duties, that conspiracy and combination is charged, then the charge falls to the ground when these powers and duties are proved to be constitutional and lawful.

In passing, all that need be said is that Article XVII, Section 5 of the Constitution of 1874, contains no inhibition against stock ownership, but under the most favorable construction to the Government is only aimed at the future establishment of relationships between railroads and coal lands. *This policy, however, was one not meant to affect those railroads who were then entitled to contract rights and legislative grants already firmly establishing their relationship to coal lands. It was not intended to operate by way of destruction of the*

enormous interests which had been acquired upon the faith of a prior policy and of prior legislation. This defendant railroad was then engaged in the carriage of coal, and coal from the very lands held and operated directly at the present time by the Lehigh & Wilkes-Barre Coal Company. These lands had been acquired by the coal companies merged in the Lehigh & Wilkes-Barre Coal Company anterior to the enactment of this constitution, which exempted them by its express provisions from application to them.

In the schedule of the constitution was the following provision:

> "Section 2. All laws in force in this Commonwealth at the time of the adoption of this Constitution, not inconsistent therewith and all rights, actions, prosecutions and contracts shall continue as if this Constitution had not been adopted."

By Section 12 of Article XVII it was provided:

> "Section 12. The General Assembly shall enforce, by appropriate legislation, the provisions of this Article."

It was not intended the new Constitution should be operative without express legislation, and, at the next session of the Legislature and thereafter, from time to time, statutes were enacted, carrying out the various provisions thereof, so far as the Legislature thought desirable.

Those who framed the Constitution of Pennsylvania knew the extent to which, in that Commonwealth, under inducements which had been held out by past legislation, the coal carrying railroad companies were possessed of coal lands and coal shares and, knowing this fact, neither possessed, nor sought to exercise, a power to divest the property rights which had been acquired or to violate the

charters which had been granted. No legislation, applicable to coal lands, or coal shareholdings, was enacted. No legal proceedings based upon any idea of a forbidding of such holdings in the case of the present defendants, were ever brought.

The laying down of a policy applicable to future holdings was one which involved no violation of right nor more than a determination as to what, in the future, by those meant to be affected, must be done. To have practically stripped the coal carrying railroad companies of the enormous properties in which their capital was then invested, would have been to precipitate a ruin which none contemplated, or dared to contemplate.

Because of these considerations, the Constitution required future legislation to make it operative. It was expressly made non-applicable to existing contracts and charters.

The fact that, since the enactment of this Constitution, all the defendant corporations have conducted their business as before, is the best evidence that the constitutional provision with regard to duality of ownership and transportation was not intended to apply, and did not apply, to them.

Regardless of the niceties of argument by counsel for the petitioner, founded on a metaphysical conception of a corporate entity, it is perfectly clear that the indirect relationship of The Central Railroad Company of New Jersey to coal lands in Pennsylvania has not been changed in any aspect by the consolidation of the Wilkes-Barre Coal and Iron Company and the Honeybrook Coal Company, who owned these lands and whose stock was acquired by the railroad company before the constitution was adopted.

Furthermore, nothing respecting this relationship between the Central Railroad Company of New Jersey and the Lehigh and Wilkes-Barre Coal Company is

made the subject of complaint in the Petition nor is any relief respecting that situation asked.

Whenever these defendants shall have been afforded a day in court on pleadings raising this issue they will be prepared to meet it with full proofs of the public and private Acts which justify their relationship.

There is no proof in the present case, either by the Government or by the defendants, which will make a discussion of this phase of the subject profitable.

The Sixty-five Per Cent. Contracts.

The Petitioner's Brief, at great length, discusses the allegations (pp. 61-75) and the legal results (pp. 206-259) of the so-called 65% contracts. The two points emphasized by counsel for the Government are that these contracts tended to tie up to the defendant railroads the coal which would otherwise have been free to compete with their respective subsidiary coal companies, and that incidentally as a result of the selling price of such coal at tide the railroad owning the purchasing coal company would not have received its published rates for transporting the coal (p. 72, Govt. Brief).

It should be noted that the Jersey Central is not a party to any sixty-five per cent. contracts. Its only possible relation to such contracts arises from the fact that the Lehigh & Wilkes-Barre Coal Company, a majority of whose stock is owned by it, is a party to three of these contracts, with three of the eighteen independent operators shipping over its line.

It will be borne in mind that Petitioner's brief, pages 61 and 62, states that in 1892, in behalf of this Company and the Lehigh & Wilkes-Barre Coal Company, there were made so-called 60 per cent. contracts for the purchase of the output of certain independent operators along the line of the Central

Railroad Company of New Jersey, and that these were to run for a period of seven years. Upon the expiration of these contracts it will be noted, on page 69 of Petitioner's brief, that the defendant made 65 per cent. purchase contracts with the Parrish Coal Company and the Red Ash Coal Company, both on May 1, 1901, and with the Melville Coal Company on June 1, 1901. From the Government's Exhibit No. 48 we learn that the tonnage purchased under these contracts in 1907 aggregated 938,600 long tons. Counsel for the Petitioner incorporated in their brief, on pages 377 and 378, a tabulation professing to show the results of the old 60 per cent. contracts in the year 1900-1901, in respect of coal shipped to New York Harbor f. o. b. vessel. From these various tables Petitioner seeks to establish the fact that the railroad company or its coal company, after taking out of the selling price of this coal the cost price and the expense of selling and the loss from waste in transit, would not have left enough to pay the published freight rates. From this Petitioner's counsel profess to make the deduction that the railroad would not have received its published freight rates for transporting this coal, and would, therefore, come under the ban of the decision of the Supreme Court of the United States in Interstate Commerce Commission *vs.* Chesapeake & Ohio Railway Company, 200 U. S., 361.

In the course of their argument, pages 225 ff. of their brief, counsel for Petitioner develop this theme more elaborately and make the assertion that by operating to give a preferential freight rate these 65 per cent. contracts, so-called, prevent the independent output not sold to the railroad coal companies from getting to the leading market of New York Harbor on equal terms with that which is so sold, thus suppressing competition, all in violation of Sections 1 and 2 of the Anti-Trust Act.

Now let us bear in mind that this petition was filed on June 12, 1907, asking that these 65 per cent. contracts held by the defendants should be declared to be contracts in restraint of trade; that they be delivered up to be cancelled and that the defendants be forever enjoined from further executing or carrying into effect any of the provisions of the said contracts and from making or entering into any contracts of like character or effect hereafter. Under ordinary circumstances defendant would feel that in the discussion of these contracts which the Government is asking to be presently cancelled defendant would be entitled to a consideration of their present effect, and if Petitioner's counsel felt that there was anything in their argument as a proposition of law they would have applied that argument to the period at which their Petition spoke instead of going back to some period long antecedent to that date.

If that be sound, and it is submitted that it is sound, then Table IV in the Appendix A of the Government Brief should be entirely eliminated from the discussion. It has no relevancy to existing conditions, speaking as it does for a period from November, 1900, to December, 1901. The only table which purports to exhibit conditions after the filing of the Petition in this case is Table X of Appendix A. In form this table is identical with Table IV, except that it covers the year 1907. To point out the fallacies and misrepresentation in this table is to impeach in the same manner the earlier and irrelevant table, and therefore the discussion will be directed to the later table alone.

The first misrepresentation in this table and one repeated from the earlier brief for the Government in the Circuit Court, where counsel's attention was specifically directed to it, is the inclusion of broken coal in this table with the obvious intention of misleading this Court to the conclusion that defendants

purchased and sold broken coal under these 65% contracts. The table then states it as a fact that all this coal was sold with a deficiency of more than 25c. per ton throughout the year.

From the Government's Exhibit No. 49, which is, however, ignored in the brief, it will be observed that this defendant *purchased no broken coal from any of the three independent producers with whom it had these 65 per cent. contracts during the three years, 1906, 1907 and 1908.*

The next deliberate misrepresentation of Government counsel in connection with this Table 10 is the deduction arbitrarily of ten cents per ton on account of expense of selling all coal of the size of Chestnut or larger, and five cents per ton for the expense of selling the smaller sizes. This misrepresentation was called to the attention of counsel for the Government in the Circuit Court and in the briefs there filed, and yet it is deliberately reiterated in the brief filed with this Court. Consultation of the record in this case will show that at page 124 of the Government's testimony that the Government's own witness testified that this cost was between three and four cents a ton. If, then, the Government's Table 10 be corrected as to the Egg, Stove and Chestnut, as it should be corrected, it will show that on those sizes there was no deficiency, except in the months of April, May, June and July, and that in the month of July there was no deficiency on the sale of the Egg coal. The following table excised from the Government's Exhibit No. 49 shows the tons of these sizes purchased under the sixty-five per cent. contracts:

1907	*Egg.*	*Stove.*	*Chestnut.*
April	19,703.16	19,591.05	23,676.14
May	17,763.02	18,913.00	20,306.15
June	17,173.15	18,006.11	19,627.19
July	15,620.19	16,501.00	17,736.01

The following table excised from Government Exhibit No. 50 shows the tons of the so-called sixty-five per cent. purchase coal shipped to New York Harbor to be put on vessels there:

1907	*Egg.*	*Stove.*	*Chestnut.*
April	10,460.07	11,009.13	11,127.19
May	12,239.09	11,987.06	12,419.18
June	12,747.01	11,215.03	11,559.09
July	8,829.06	6,472.05	3,897.14

The following table excised from Government Exhibit No. 51 shows the total number of tons of coal of the sizes named shipped to New York Harbor to be put on board vessel, including coal mined, purchased or otherwise acquired:

1907	*Egg.*	*Stove.*	*Chestnut.*
April	37,926.18	60,573.13	40,020.17
May	57,389.03	62,123.18	44,967.02
June	52,068.01	59,991.13	41,665.08
July	36,666.14	35,920.07	41,849.10

Now, if, in the months during the year when these sizes of coal in Table 10 showed a profit, six cents per ton be added to the profits, as it should be because of the misrepresentation of the Government's counsel in puffing the expense of selling by that amount, and if the months in which a deficiency is shown are revised by subtracting the six cents from that deficiency, the net result is very different from that stated by Government counsel. If the Court will further consider the above excerpts from Government Exhibits 49, 50 and 51, it will be seen that the proportion of the sixty-five per cent. contract coal sold at tidewater is, roughly, only about half of the purchase coal, a little more than half in most cases in the Egg coal and very much less than half in the Stove and Chestnut coal.

If, again, the amount of the purchase coal sold at tide be compared with the total amount of coal sold at tide during the months in question, it will be observed that, roughly, it is only about a quarter of the coal of these sizes thus sold at tide. All this coal being mingled together, it would seem perfectly obvious that the "extortinate profit made by the coal company on its own coal," as alleged by the Government, would wipe out many times any slight deficiency that would be left on the small volume of purchase coal if any such deficiency were shown to have existed. It is submitted, however, that the Government utterly fails to show any such deficiency, unless it juggles with the figures in the most unprincipled manner by assuming, what is not the fact, that the selling cost of this coal is ten cents per ton. There is no need of discussing the sizes smaller than Pea in this table, for the reason that either it shows a profit, or, in the one instance of the month of September in the case of Buck No. 1, would show a negligible deficiency if the Government's figures were revised to the proper basis.

This leaves for consideration only the Pea coal. The same general considerations adverted to above as applicable to the other sizes apply with even greater force to the Pea coal. The proportion of the purchase Pea coal sold at tide in relation to the volume of all Pea coal there sold by the defendant is insignificant. The deficiency under the revised figures would be small. When we consider that this record teems with statements that the Pea coal is a by-product of washeries which is sold in competition with Bituminous coal, and very generally at an apparent loss simply to enlarge the volume of operations and thus reduce the overhead charges per ton, it is clear that no cogent argument can be constructed on any basis of the results of the sale of this particular quality of coal.

All this coal was as a matter of course commingled, and any slight deficiency therefore resulting from the sale of the purchase coal in the four months of 1907, was not only compensated for by the profits in the remaining eight months of the year on the purchase coal, but likewise by the profits on the coal which defendant mined and sold itself. From this résumé of facts it would seem clear to the meanest intelligence that the Chesapeake & Ohio case, upon which the Government places so much reliance, has not the slightest bearing on the case made against this defendant. Taking the purchase coal alone, this defendant has shown from the Government's own exhibits that it makes a profit over and above purchase price, selling cost, waste and tolls for the year succeeding the filing of the Government's Petition. It will be borne in mind that in the Chesapeake & Ohio case that railroad company was called upon to defend a contract running for five years covering 2,000,000 gross tons of bituminous coal, every ton of which was to be sold every day for that period for $2.75 per ton, and that the price left to the Chesapeake & Ohio Railroad Company only 28 cents per ton for carrying the coal from the Kanawha District to Newport News, whilst the published tariff for that carriage was $1.45 per ton. The inapplicability of the Chesapeake & Ohio case as ruling in any manner the facts made out against this defendant by the Government's own exhibits is so plainly demonstrated that it would be imposing upon the Court to argue the question further. In no aspect and under no circumstances could the Chesapeake & Ohio hope to make even 20 per cent. of its freight rate on any single ton of coal at any time during the period of five years, while this company year in and year out for three years has made a profit on the average ton on all this purchase coal.

The fact that during the four months in 1907, certain individual tons of coal were not sold at a price enabling this defendant to accomplish that result has absolutely no significance. To bring the defendant within the ban of the Chesapeake & Ohio case Petitioner must show a parallel situation in which for a period at least amounting to a year the defendant failed to meet all costs and have a slight profit.

The Government has devoted a great deal of argument in attempting to prove that the negotiation and consummation of the 65 per cent. contracts amounted in effect to decreasing a great proportion of the independent production in the territory in which the mines are located and getting it out of competition with coals owned by the defendant, while at the same time getting rid of independent producers as incorrigible disturbers of the rate situation and chronic agitators for a rate reduction. It will be borne in mind, from a reference to Government Exhibit No. 48, that the defendant coal company has 65 per cent. contracts with the Parrish Coal Company, the Red Ash Coal Company and the Melville Coal Company, and from Government Exhibit No. 42 it will be seen that there are the following collieries and operators located on or reached via the line of the Central Railroad Company of New Jersey in addition to these three independent operators. This list is as follows:

(1) Sugar Notch Washery,	North American Coal Company,	17 Battery Pl., N. Y.
(2) Lee Washery,	West End Coal Company,	Scranton, Pa.
(3) Hadleigh Colliery,	Pittston Coal Mining Co.,	Pittston, Pa.
(4) Alden Colliery,	Alden Coal Company,	Alden, Pa.
(5) Upper Lehigh Colliery,	Upper Lehigh Coal Co.,	Upper Lehigh, Pa.,
(6) Sandy Run Colliery,	M. S. Kemmerer & Co.,	Sandy Run, Pa.
(7) Beaver Brook Colliery,	C. M. Dodson & Co.,	Bethlehem, Pa.
(8) Beaver Brook Washery,	"	"
(9) Coleraine Colliery,	Est. A. S. Van Wickle,	Hazleton, Pa.
(10) Summit Colliery,	Lehigh Coal & Nav. Co.,	108 S. 4th St., Phila.
(11) No. 1 Colliery,	"	"
(12) Kaska William Colliery,	T. M. Dodson & Co.,	Bethlehem, Pa.
(13) Maryd Colliery,	Maryd Coal Co.,	1725 Land Title Bldg., Phila., Pa.
(14) Hacklebernie Colliery,	Hacklebernie Coal Co.,	Mauch Chunk, Pa.
(15) Pond Creek Colliery,	Pond Creek Coal Co.,	Pittston, Pa.

This bare statement sufficiently answers this unwarranted innuendo that the three 65% contracts of the Lehigh and Wilkes-Barre Company decreased a great proportion of the "independent" coal production in that territory.

As further demonstrating the absurdity of the Government's deductions as to the purpose of these

contracts, it will be noted that it appears in the Government's testimony, on page 629 of the record, that *all the collieries of the Parrish Coal Company and the Melville Coal Company are held by these companies under leases from the Lehigh and Wilkes-Barre Coal Company, while the lands comprising the Red Ash collieries are, as to a substantial part of them, held under lease from the Lehigh and Wilkes-Barre Coal Company.*

Petitioner has also sought to give a sinister touch to these contracts in other incidental and trivial ways during the course of argument. Inasmuch as this is a question of fact and not of law, a protracted argument seems fruitless. Defendant, therefore, in answer to these innuendoes begs to subjoin in considerable fulness the testimony of its President at the hearing, quoting with irrelevant omissions between pages 1166 and 1173:

> "A. There never has been any combination, or agreement, or scheme, or conspiracy whatever of that kind at all. I see, by looking at your pleadings, that in paragraph (*a*) a reference is made to the sixty-five per cent. contracts. The custom of the coal companies was, for a long period of years, to make contracts with the individual operators, whose outputs were small, to sell their coal for them. The cost of selling coal to an individual is necessarily large. He must keep offices in different cities and different places, and it involved a very heavy expense for a small output; so that gradually the individual operators found it to their advantage to sell their coal on the percentage basis to the coal companies, and they thought it was profitable to do so. I was not in touch with the details of those contracts up to 1890. I knew only in a general way that the contract was sixty per cent. at about that time, based upon sixty per cent. of the f. o. b. selling price in New York. In 1900, in the midst of that strike, after our friends in New

York had forced us to accept a proposition to advance wages ten per cent., the individual operators refused to join in the advance and we had long negotiations——

By Mr. McReynolds:

Q. Who do you mean by 'we'? A. The coal presidents and the anthracite people interested in the strike, and some of the individual operators were with us; that we had a committee—I do not remember who it was—representing the negotiations, you know, with Hanna and with the miners' organization; and, afterwards Thomas and Truesdale and myself, representing the Reading at that time, although I was not president at that time——

By Judge Campbell:

Q. You were a member of the Executive Committee? A. I was on the Executive Committee, and I was asked to take charge of that.

Q. On behalf of the Philadelphia and Reading Coal and Iron Company? A. On behalf of the Philadelphia and Reading Coal and Iron Company, on whose Executive Committee I was. Mitchell would not call off the strike unless these individual operators put up notices, which Hanna and he had prepared, which amounted to an agreement to advance wages ten per cent., unless these operators got a better price for their coal. They said they could not afford to do it, and finally we had a conference at the Erie office with them. They appointed a committee, and, after a long negotiation, they agreed to put up these notices if the advance was made to sixty-five per cent., and then we agreed to do that, provided they would agree to appoint a committee to take up the whole subject of the preparation of coal and a number of details connected with such an advance. They appointed a committee and we appointed a committee, and then they called a further meeting of independent operators and put up the notices.

It would be an interesting political history; I have all the telegrams from the distinguished chairman of the Republican Committee on that subject, but I do not think it would be advisable to put them in the record unless they are desired. Then the committee was appointed, they put up the notices, and the strike ended, and we sat for three or four months here in Philadelphia trying to work out the problem. The great contention was between the coal companies and the individual operators as to the exactions of preparation. They did not want the inspection to be so rigid. They thought that the quantity of slate we minimized too much. They thought some of the sizes should be done away with. We had a long and a very serious time, until finally we agreed to recommend to the different companies a form of agreement, and that is now known as the sixty-five per cent. agreement. It was optional to any of the independent operators, or any of them, to accept it or not. Some of them did, and quite a number did not. I think we have now only three or four.

Q. About five, I think the record shows. A. This spring, Thorne's Company—the Buck Mountain people—came and said they did not want to work under that contract, and I said all right and released them. We do not care anything about it. If they do not see fit, those contracts are no special advantage to us. It is really for the benefit of the independent operator, for the reason I gave you, that he gets his money certain for the sale of his coal; he has no expense in marketing it, he need not store his coal and he runs no risk in the solvency of the buyer. All those things the companies take upon themselves and, so far as my companies are concerned, we are perfectly willing that they shall cancel these contracts at any time. We do not care anything about them, and I have never refused any offer to cancel the contracts.

Q. To get to the precise terminology of these allegations, I read that the charge is that these contracts were entered into 'in order to prevent the output of the independent mines from being sold throughout the several States in competition with the output of their own mines or the mines of their subsidiary coal companies.' A. I never heard of any such proposition except in the newspapers and in the Government's petitions. Among coal men we never heard of any such thing.

Q. Was that motive or purpose considered by anybody? A. I never heard of it.

Q. Was it suggested by anybody at any time? A. I never heard of it.

Q. In this connection, is it true, as charged, that these parties 'entered into and now maintain an agreement, combination or conspiracy to use their power as such carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several States? A. No; it is not true. My former answer explains that.

Q. Did this company, the Philadelphia and Reading Coal and Iron Company, ever undertake in any way, shape, manner or form, to force, or even induce, any independent operator to enter into a sixty-five per cent. contract? A. No; we never requested any of them to do it, never urged them, and were indifferent as to whether they did it or not. The contracts were entered into voluntarily by these people, and it was then, is now, ever has been and, I think, ever will be, a matter of indifference to the Coal and Iron Company as to whether they enter into these contracts or cancel them.

Q. There is just one other corollary to to these charges which I desire to meet. Did the Philadelphia and Reading Coal and Iron Company, or the Philadelphia and Reading Railway Company, or the Reading Company, have any understanding or agreement that the other companies should use the power of

the carriers or their situation to force their individual operators into the execution of these contracts? A. Certainly not.

Q. Nothing of the kind ever transpired? A. Certainly not.

Q. At Judge Moot's suggestion, I inquire whether you can speak for the Central Railroad Company of New Jersey, and the Lehigh and Wilkes-Barre Coal Company in respect of their motives, purposes and conduct in relation to those matters in the same way? A. I make the same answer as to them that I do as to the Reading, as representing both of those companies. Nothing of the kind ever took place. They never made any effort, and are indifferent as to whether these independent operators work under the sixty-five per cent. contracts, or whether they mine and sell their own coal. * * *

Q. I do not intend to burden your answers with the details of that, but is it not true, as a fact, that contracts were entered into with all or nearly all of the individual operators on your lines? A. No, sir; it is not true, nor on the lines of the Jersey Central.

Q. It is charged that it was the purpose of these sixty-five per cent. contracts to fix the price to be paid in these words: 'Fixed the said percentages to be paid by them or their coal companies under said contracts at a point that bore such a relation to the published rates of transportation, that, taking for a basis the average tidewater price of anthracite when the contracts were made, and during many years previous (barring strike period), the independent operator who entered into one of these contracts realized upon his coal from fifteen to fifty cents more a ton, approximately (depending upon the length of the haul and variations in the tidewater price), than was realized by the independent operator who shipped his coal to tidewater on his own account, paying the published rates of transportation himself, and sold it there in competition with the coal of the defendant carriers and their coal com-

panies, which difference or advantage represents the amount per ton that the defendant carriers or their coal companies paid for the privilege of controlling the sale and disposition of the independent output so as to prevent it from selling in competition with the output of their own mines, as aforesaid. The result of this arrangement, as was intended, was to draw, if not to force, the great majority of the independent operators into making the aforesaid contracts, thereby enabling the defendant carriers and their subsidiary companies, the defendant coal companies, to control absolutely and until the mines are exhausted, the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several States, particularly in the great tidewater markets.' Is that allegation true? A. No; it is not correct at all. All the operators could have accepted those contracts if they wanted to, and the fact that they did not accept them shows that they must have been making a greater profit by not accepting them than otherwise they would make. Probably they have facilities for marketing their coal which they considered better than ours. * * *

Q. Mr. Kemmerer, who was of the firm of Whitney & Kemmerer, was a member of this committee you refer to? A. Yes; Kemmerer, Dr. Howe and Mr. Connell. * * *

Q. Did Whitney & Kemmerer ever enter into any of these contracts, notwithstanding they were members of this committee and in the negotiation of the form of the contract? A. No; I think they never entered into it. Not with our company; no.

Q. Nor with the Coal and Iron Company nor with the Lehigh and Wilkes-Barre? A. No, sir. * * *

Q. Then the whole motive and purpose of these contracts, so far as your defendants are concerned, were simply what they purport to be; to enable the coal producers, parties to

> the contracts, to sell their coal in the manner in which they desired, and not for any purpose whatsoever of controlling the output or enlarging the area of control of the Philadelphia and Reading Coal and Iron Company over the production and sale of coal? A. Certainly. There was no thought about that in the negotiations.
>
> Q. They were *bona fide* contracts for the sale of coal, as they purport to be? A. Certainly.
>
> Q. Without any ulterior purposes of any kind? A. None whatever."

Without expanding the argument on these facts unduly, defendant contends that, in the light of the history of these contracts, and in the light of the frank statements of the witness as to the manner in which they were negotiated and the purpose for which they were entered into, they must be treated as what they apparently stand for—a mere purchase and sale contract of a purely legal and commercial sort and beyond reproach. What was said in a recent criminal case has equal application to this equity case respecting incidental transactions of this sort explainable on a perfectly rational basis, and the effect of which, if any at all, on interstate commerce, is most trivial and incidental. The case referred to is that of the Union Pacific Coal Company *v.* United States, 173 Fed. Rep., 737. In that case Mr. Justice Sanborn (subsequent to his very interesting opinion in the Standard Oil case) had the following to say respecting the scope and purpose of the Anti-Trust Act:

> "The act of July 2, 1890, does not denounce every combination to engage in or to conduct commerce among the states or with foreign nations, but those combinations alone which restrain that commerce. It does not denounce every combination which restrains that commerce, but those combinations only, the necessary effect of which

is to stifle, or directly and substantially to restrict, free competition in that commerce. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S., 290, 330, 339, 340, 17 Sup. Ct., 540, 41 L. Ed., 1007; Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 234, 20 Sup. Ct., 96, 44 L. Ed., 136; United States *v.* Joint Traffic Ass'n, 171 U. S., 505, 576, 577, 19 Sup. Ct., 25, 43 L. Ed., 259; United States *v.* Northern Securities Company (C. C.), 120 Fed., 721, 722.

"If the necesasry effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law. Hopkins *v.* United States, 171 U. S., 573, 592, 19 Sup. Ct., 40, 43 L. Ed., 230; Anderson *v.* United States, 171 U. S., 604, 616, 19 Sup. Ct., 50, 43 L. Ed., 300; United States *v.* Joint Traffic Ass'n, 171 U. S., 505, 568, 19 Sup. Ct., 25, 43 L. Ed., 259; Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 245, 20 Sup. Ct., 96, 44 L. Ed., 136; Whitwell *v.* Continental Tobacco Co., 125 Fed., 454, 458, 60 C. C. A., 290, 294, 64 L. R. A., 689, and cases there cited. There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce.

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court

to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. Vernon *v.* United States, 146 Fed., 121, 123, 124, 76 C. C. A., 547, 549, 550; United States *v.* Richards (D. C.), 149 Fed., 443, 454; Hayes *v.* United States (C. C. A.), 169 Fed., 101, 103; United States *v.* Hart (D. C.), 78 Fed., 868, 873, affirmed in Hart *v.* United States, 84 Fed., 799, 28 C. C. A., 612; United States *v.* M'Kenzie (D. C.), 35 Fed., 826, 827, 828; United States *v.* Martin, 26 Fed. Cas., 1183, 1184 (No. 15,731); People *v.* Ward, 105 Cal., 335, 341, 38 Pac., 945; People *v.* Murray, 41 Cal., 66, 67; State *v.* Hunter, 50 Kan., 302, 32 Pac., 37; Bradshaw *v.* State, 17 Neb., 147, 22 N. W., 361, 366."

Wherefore, these defendants submit that:

(1) The Petition should be dismissed as against them because on the merits of the case these defendants have not been shown to have been engaged in any such combination as that alleged, and that

(2) The 65 per cent. purchase contracts of the Lehigh and Wilkes-Barre Coal Company are perfectly legal purchase contracts, entirely beyond the inhibitions of the Act of July 2nd, 1890.

(3) The Bill should be dismissed at the costs of the Petitioner.

All of which is respectfully submitted,

ROBERT W. DE FOREST,
JACKSON E. REYNOLDS,
Of Counsel for the Central Railroad Company of New Jersey, Lehigh & Wilkes-Barre Coal Co.

198.

No. [illegible]

OCTOBER TERM, [illegible]

IN THE

Supreme Court of the United States

THE UNITED STATES, Appellant,

vs.

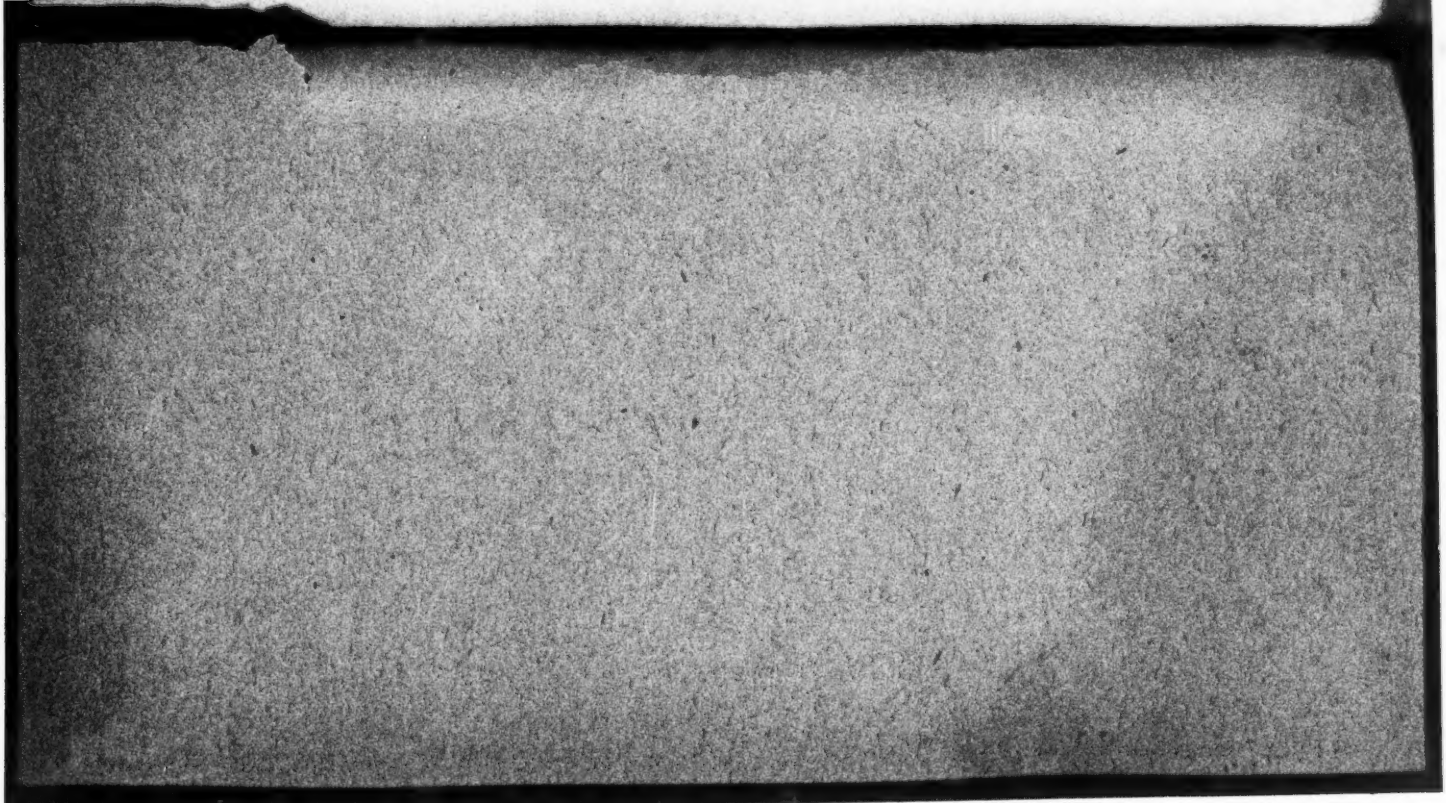
THE READING COMPANY, THE PHILADELPHIA AND READING RAILWAY COMPANY, *ET AL.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR READING COMPANY, APPELLEE.

CHAS. HEEBNER,
Of Counsel.

[illegible], Lewis & Ritter, Rpr., Philadelphia.



In the Supreme Court of the United States.

October Term, 1910. No. 477.

The United States, Appellant.

vs.

The Reading Company, The Philadelphia and Reading Railway Company, et al.

BRIEF FOR READING COMPANY, ONE OF THE APPELLEES.

In this proceeding, Reading Company is charged in the alternative with acting through its subsidiary company, the Philadelphia and Reading Coal and Iron Company, in respect of the acquisition of coal lands and mines and the production and sale of anthracite coal; there being no evidence that Reading Company ever engaged directly in that business, but the contrary being shown by the Government's "agreed statement" and by Government exhibits and proofs.

Reading Company is also charged therein in the alternative with acting through its subsidiary company, Philadelphia and Reading Railway Company, in respect of the transportation of anthracite coal in interstate commerce and the rates therefor; there being no evidence that Reading Company ever engaged directly in that business,

but the contrary being shown by the Government's "agreed statement" and by Government exhibits and proofs.

Reading Company, together with certain other defendants, is charged with violating the Act of July 2d, 1890, in joining with those defendants in the acquisition of the capital stock of The Temple Iron Company and in respect of, and because of, certain transactions of that company.

This brief will not repeat the arguments contained in other briefs for defendants with regard to the transactions of these other companies, in which it may be directly or indirectly concerned, but will be confined to the consideration of the other charge against it relating to the subject of

THE ACQUISITION BY READING COMPANY OF THE MAJOR PORTION OF THE CAPITAL STOCK OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

I. THE PLEADINGS.

(*a.*) The petition, in sub-section (*c.*) paragraph VII (Record, Vol. 1, page 20), alleges that about January, 1901, Reading Company, owning the entire capital stock of both The Philadelphia and Reading Railway Company and The Philadelphia and Reading Coal and Iron Company, issued additional shares of its capital stock to the amount of $3,017,650, of first preferred and $1,713,750 of second preferred and additional bonds, due in 1951, to the amount of $23,000,000, which it gave in exchange for a majority, to wit, 145,000 shares, of the capital stock of the Central Railroad Company of New Jersey, and thereby brought under one controlling power not only those two carrier companies, which, it further alleged, operated parallel and competing lines of railroad, but also The Philadelphia and Reading Coal and Iron Company and The

Lehigh and Wilkes-Barre Coal Company. This, it is charged, destroyed every motive for competition between said railroad companies and established a monopoly of the interstate transportation, particularly the transportation of anthracite coal formerly carried on by them as competitors, and further destroyed every motive for competition between the said coal companies in the sale of coal throughout the several States.

(*b.*) The answer, paragraph VI (Record, Vol. 2, page 45) states:—

> "And this defendant, answering unto the several matters and things alleged and set forth in item (*c.*) of the plaintiff's petition says:—
>
> "This defendant denies that the Central Railroad Company of New Jersey operates a line of railroad between the anthracite regions in Pennsylvania and tidewater points in the vicinity of New York Harbor that is substantially parallel to, and in the absence of a restraining agreement or combination would be a competitor for traffic with, the lines of railroad operated between the same points by the said defendant the Philadelphia and Reading Railway Company; it avers that the lines of the defendant, the Central Railroad Company of New Jersey, in the State of Pennsylvania, reach and traverse a wholly distinct and different part and portion of the so-called anthracite region, widely separated from those parts reached and traversed by the lines of the said Philadelphia and Reading Railway Company; that no part of the territory or traffic of the said anthracite region tributary to the said lines of the Central Railroad Company of New Jersey, are, or can become tributary to the lines of the Philadelphia and Reading Railway Company; that the said Philadelphia and Reading Railway Company is not, was not then and there, or before or since, and could not become a competing line, or a competitor for traffic with the defendant the Central Railroad Company of New

Jersey in respect of the anthracite coal produced or to be produced on the lines of the said Central Railroad Company of New Jersey; that the Central Railroad Company of New Jersey is not, was not then and there, or before or since, and could not become, a competing line or a competitor for traffic with the defendant the Philadelphia and Reading Railway Company in respect of the anthracite coal produced or to be produced on the lines of the said Philadelphia and Reading Railway Company; and this defendant denies that the said lines of railroad are, or ever were, parallel or competitive with each other for any traffic of any kind or nature whatsoever; on the contrary, this defendant avers that the system of railroads of the Central Railroad Company of New Jersey and those of the Philadelphia and Reading Railway Company and its predecessor are, and always have been, since their construction connecting lines of railroad, supplementing each other in the formation of through routes for the transportation of the commerce of the country; that the continued maintenance of the said through routes for transportation, instead of tending to hinder or restrain the trade or commerce among the several States, or with foreign nations, contrary to the provisions of the said Act of July 2d, 1890, is of vast importance in aiding and facilitating the same, in precise conformity to the spirit and purpose of the Act to Regulate Commerce and its several supplements in that behalf, each forming the essential and absolutely necessary outlet for the interstate and foreign traffic carried by the other in cases where the destination of the traffic is beyond the line on which its movement originates; that is to say—the lines of the said systems connect at Bound Brook, in the State of New Jersey, and form through routes for the transportation of persons and property between all points to the eastward of the said Bound Brook, including New York Harbor and points east thereof, to all points reached by way of the lines

of the said Philadelphia and Reading Railway Company and their connections, including those of the Baltimore and Ohio Railroad Company to the South and West; they are also connected at Allentown, in the State of Pennsylvania, and form through routes of transportation between points to the eastward reached by the lines of the Central Railroad Company of New Jersey, and points to the westward reached by the lines of the Philadelphia and Reading Railway Company and their connections, including the lines of the Pennsylvania Railroad Company from Harrisburg, Pennsylvania, to all points in the West, Northwest and Southwest, and including the lines of the Baltimore and Ohio Railroad Company to all points West, South and Southwest, they also connect at Tamanend and Haucks Switch, in the State of Pennsylvania, and form through routes of transportation between all points to the eastward aforesaid, and by way of the lines of the New York Central system with all points to the West and Northwest; and they also connect at Bethlehem Junction, in the State of Pennsylvania, and form through routes of transportation between all points south of Bethlehem Junction, including the city of Philadelphia, and points south thereof, and all points reached by way of the lines of the Central Railroad of New Jersey and their connections to the Northward, and Westward; and that the acquisition by this defendant of the equitable or beneficial interest in certain of the said shares of the capital stock of the Central Railroad Company of New Jersey as hereinafter specifically mentioned and described was and is in strict harmony with the public policy of the United States as defined in the Act to Regulate Commerce and its various supplements, and by the report of the Interstate Commerce Commission (12 Interstate Commerce Reports) wherein it is stated:—

" 'Railroads should not be permitted to invest generally in the stocks, bonds and securities of other

railway and steamship companies, except connecting lines for the purpose of forming through routes of transportation including branches and feeders. *It is in the interest of the public to facilitate the consolidation of connecting lines.'*

"And this defendant further answering unto the said several matters and things alleged and set forth in the said item (*c.*) of the said paragraph VII of the Plaintiff's petition, but denying all manner of unlawful confederation, combination and conspiracy in that behalf, alleges and avers:

"That, being then and there the owner of the said equitable or beneficial interest in the major portion of the shares of the capital stock of the said Philadelphia and Reading Railway Company, this defendant, on or about January 7th, 1901, by and through its properly authorized representatives, agreed to purchase from the owners and holders thereof one hundred and forty-five thousand (145,000) shares of the capital stock of the said Central Railroad Company of New Jersey, which were afterwards transferred to and vested in this defendant, in consideration, among other things, of the execution by this defendant, of a certain purchase money collateral Indenture to secure an issue of bonds for the aggregate principal sum of $23,000,000; whereupon, on the first day of April, 1901, this defendant made and executed the certain Indenture now here shown to the Court, which this defendant craves leave to produce and introduce in evidence at the hearing, wherein and whereby, in order to secure the payment of the principal and interest of all such bonds as should be at any time issued or outstanding thereunder, this defendant assigned, transferred and pledged unto The Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation of Pennsylvania, its successors and assigns forever, among other things, the following shares of the capital stock then belonging to this defendant, for which certificates were to be transferred and delivered,

either by the Reading Company or by the record holders of such certificates or shares, to the Trustee as therein provided, namely:—

"One hundred and forty-five thousand (145,000) shares of the Capital Stock of the Central Railroad Company of New Jersey, of the par value of $100 each, being a majority of the whole capital stock of said Company; but, in trust, nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by the said Indenture.

"That at and upon the execution of the said Indenture a certificate or certificates of the Central Railroad Company of New Jersey was issued and registered upon the books thereof in the name of the said The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, which was or were then and there delivered unto the said Trustee, which still remains the owner and holder thereof, under the trust mentioned and set forth in the said Indenture, and that there were then issued and now remain outstanding and unpaid in the hands of the public $23,000,000 in amount of the bonds of this defendant, the payment of the principal and interest whereof by this defendant is secured by the said assignment, transfer, pledge and deposit of the said certificate or certificates representing the said one hundred and forty-five thousand shares of the capital stock of the said Central Railroad Company of New Jersey."

II. THE EVIDENCE.

1. THE ACTUATING INTENT AND PURPOSE OF THIS ACQUISITION.

The facts concerning the transaction are presented in the testimony of Mr. George F. Baer, president (Record, Vol. V, pages 1185, 1186):—

"Assuming that you have the maps, showing the locations of the different roads, it is apparent that the Jersey Central System was and is still absolutely essential to the Reading system to get an entrance to the New York Harbor, which, of course, is the great harbor of the country. For years and years attempts were made to unite these two properties, which complement and supplement each other. They are not parallel and competing lines in any sense of the term. The Reading must get to New York over the Jersey Central system, and the Baltimore and Ohio, which is an important connection with the Reading and gives it some of its largest freight, must get to New York over the Central system. The Central Railroad fortunately has the best terminals in the harbor of New York; I mean rather facilities for the best terminals. They own large areas of land there that are capable of development to meet the wants of the company for a hundred years to come."

* * * * * * *

"In December, 1900, I happened to be in New York and I was told that the gentleman who controlled the New Jersey Central were tired of it, and that the stock was for sale. I was also told that the Baltimore and Ohio Railroad had made an offer for this stock, which the parties had refused because they considered it too small. This information was a great surprise and I at once went to Mr. Morgan, who was a voting trustee of the Reading Company and told him that the situation was most alarming; that it would be the ruin of the Reading property if an antagonistic company got control of the Jersey Central, or if the Baltimore and Ohio got us by the throat in that way and could control our terminals into New York, and that therefore the matter called for prompt action. I told him then that I always thought that the Jersey Central could be legally bought; that the limitations in the laws of New Jersey applied only to leasing, and that, under the powers of the Reading Company and under the

statutes of New Jersey, we could undoubtedly buy a majority of the stock. He told me to keep my own counsel and look up the whole subject and see what could be done. I came home and I made a critical and careful examination of the reports of the New Jersey Central Railroad for a number of years, to see what in my judgment its stock would be worth, taking into account the future possibilities.

"I also took up the question of how we could buy it and finance it. I made a report to Mr. Morgan in about a week's time. It took me a good while to get all the information I got, because I had to do it secretly, you know, as counsel. I sent it to Mr. Morgan and it was such a big letter that he did not read it until in a few days I called his attention to it, and then he picked it up and read it in the evening after business hours. When I got home, one night in Reading there was a call at the telephone and I went to the phone and Mr. Morgan was there, telling me to come to New York immediately, that I must come on at once about that Jersey Central business. I went to New York the next morning. I saw Mr. Morgan and told him that if he thought the financial plan was sound and he could back it—it involved that collateral trust mortgage, you know, and the borrowing of money— that I would be responsible for the rest of it, that I thought it was sound. He said to me, 'What do you think is the fair price?' I said, 'I have named what I think is the fair price in there.' He called for Mr. Baker, who was the chairman of their committee, or leading man in it. Mr Baker came over and we sat down and dickered for about five minutes, until Mr. Baker said they would take one hundred and sixty and I said I thought I would advise that, and I went to the phone and called up Mr. Welsh and Mr. Harris, who were, with myself, a majority of the executive committee and they said, 'Yes,' and the deal was closed. That is the whole story. We did not even make a writing about it. Mr. Baker said he would undertake himself and with Mr.

Maxwell and friends to deliver us a majority of the stock. I do not know what further I can say about it."

"By MR. DICKSON:

"Q. It was not done to stifle competition? A. Indeed, it was to enable us to compete with the people that had us by the throat in the New York harbor and *is was absolutely essential to the prosperity of the Philadelphia and Reading Railway Company and the territory that depends upon the Philadelphia and Reading Railway* for transportation that we should get terminals in New York. Instead of stifling competition it created the competition that has led to hourly trains—the best trains, let me say, in the world—between here and New York, in competition with the Pennsylvania Railroad, which, take it all in all, is the greatest railroad—I will not say it is the best—in the world.

"Q. To respond to the allegations of this petition, was this purchase of this interest which the Reading holds in the Central Railroad Company's stock, induced by any understanding or agreement, or combination with other defendants in this suit, or any of them? A. They knew nothing about it. I do not think they would have liked it then, or that they like it very much now. There was nobody that knew anything about it. There was no consultation with anybody, except the story as I have given it to you. It really was my own initiative when I heard that this property was for sale, and the general impression that the New Jersey Central had was that, because these prior suits had been decided against us, the Reading could not take it and we were not considered as a factor in the purchase at first. When I heard that it was for sale, I simply said: 'We can take that property by buying the stock,' and it was so secretly done that nobody knew anything about it until the thing was consummated, except Mr. Twombley, Mr. Robert Bacon and Mr. Morgan. Mr. Twombley happened to be in Mr. Morgan's office—in fact, it was in Mr. Twombley's office that I heard first that this stock was for sale.

"Q. One of the allegations of the plaintiff's petition is that, instead of an outright purchase of securities and stocks, this was affected by means of a mere exchange of securities. A. Exchange of securities?

"Q. Yes; in other words, that the Reading Company in payment for that stock exchanged its collateral trust bonds with the owners of the stock for their stock. What is the truth about that? A. Why, no.

"Q. That is the allegation in the petition. A. Where do such stories arise? When we determined to take it, we took the usual way of creating a syndicate, and the Reading bonds were sold to the syndicate and they paid their money for them. The only trouble I had about that was that some of the Philadelphians here complained that they did not get a big enough share in the syndicate. All those bonds were sold in the regular way. The bankers formed a syndicate and subscribed for them and put them on the market, and they are good bonds everywhere except in your State of New York, where, under the insurance laws they seem to be tabooed for insurance companies; but other people consider them about the safest bond there is to be found anywhere. It is not creditable to your New York legislation on insurance investments."

2. THE LINES OF RAILROAD OPERATED BY THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THOSE OPERATED BY THE PHILADELPHIA AND READING RAILWAY COMPANY ARE, AND ALWAYS HAVE BEEN SINCE THEIR CONSTRUCTION, CONNECTING LINES SUPPLEMENTING EACH OTHER IN THE FORMATION OF THROUGH ROUTES FOR THE TRANSPORTATION OF COMMERCE. THEY ARE NOT, IN EVEN A QUALIFIED SENSE, "PARALLEL."

The maps in evidence—one of which, with lines of Central Company marked in red, is attached to this brief—and the official public maps of which the court will take judicial notice, show that: Beginning at the first point of connection in the east, where the lines of the Reading system first intersect those of the Central near Bound Brook, New Jersey,

these systems approach each other at a substantial right angle—the lines of the Central coming to the common point from the west, northwest and north—while the lines of the Reading approach from the direction of Philadelphia, to the southwest—the tracks of the Central extending northward and eastward from Bound Brook to New York harbor, furnishing the terminal facilities common to the traffic coming from or going to each in different directions. The lines of the Reading furnishing to the Central an outlet—a through and continuous line and joint route for traffic originating north and east of Bound Brook, including the great commercial center of Greater New York, and points east, while the lines of the Central furnish an outlet to points east of Bound Brook, including Greater New York and points east for the enormous freight and passenger traffic originating on its lines and connections destined to the southward including Philadelphia, Baltimore and Washington, and other points to the southward on the lines of the Baltimore and Ohio Railroad. The maps show that the local territory occupied by these diverging lines, the one coming from the westward and other from the southward—the lines of the Lehigh Valley intervening between the two—cannot be served by both—that they are not and cannot become competitors with each other for the same traffic in those several regions.

It is also seen that the Port Reading Railroad, the coal branch of the Reading System, leading to Staten Island Sound, leaves the line of the Reading some miles south and west of Bound Brook, and nowhere touches or comes near the lines of the Central between Bound Brook and New York, the lines of the Lehigh Valley again and later those of the Pennsylvania system intervening between the two.

The next point of intersection is at South Bethlehem, where the North Pennsylvania Railroad, operated under lease by the Philadelphia and Reading, where again the two systems approach at right angles, and where the same conditions of through routes and interchange of traffic, as well as the conditions of non-competitive local service apply, as in the case of the Bound Brook intersection.

Westward of the Delaware River, the lines of the Central proceed from Easton towards a part of the anthracite coal regions, and the lines of the Reading System proceed from Philadelphia towards a wholly different region—neither penetrating the region reached and served by the other. Easton and Philadelphia are shown to be about sixty miles apart. From Easton the lines of the Central proceed up the valley of the Lehigh River to its headwaters, swinging and diverging to the northward and finally to the northeastward away from the coal fields served by the Reading lines, crossing the divide between the headwaters of the Lehigh and the valley of the north branch of the Susquehanna and thence up that stream. While the Reading System proceeds from Philadelphia up the valley of the Schuylkill River and its tributaries, serving a wholly different section of territory in nowise capable of service by both systems; upon reaching the anthracite regions in Schuylkill County the anthracite roal regions are divided by Broad Mountain in two sections, one to the south and the other to the north thereof, and in both cases the main trunk lines of the Reading deflect to the westward, away from the lines of the Central, and the territory served by it, that on the south through Schuylkill westward into Dauphin County, and that on the north through Schuylkill, a corner of Columbia, into Northumberland County, in both cases by lines which run at right angles or nearly so to the lines of the Central, leading into the northern region, which lines of the Reading System nowhere penetrate, while the lines of the Central do not anywhere penetrate into the regions reached and served by the Reading System, either for anthracite or any other traffic.

Proceeding westward and northwestward from Easton up the valley of the Lehigh River, the lines of the Central connect with the tracks of the Lehigh Coal and Navigation Company, which owns substantially all the anthracite coal deposits in the "Lower Lehigh" region in Carbon County; this coal when passing to the eastward to New York tide is wholly shipped via the "Lehigh and Susquehanna Railroad," a line owned by the Coal

and Navigation Company but operated under lease by the Central Company, to which this traffic is pledged and bound both by contract and mutual interest.

These maps show that the lines of the Reading nowhere penetrate the "Lower Lehigh" region owned by the Coal and Navigation Company.

Above South Bethlehem, the next point of intersection of the tracks of the Reading system with the main line (or any branch) of the Central, is at Allentown in Lehigh County, where two converging branches of the Reading system, the East Penn branch, a leased line, and the Perkiomen branch, an affiliated line, connect with the Central, again at right angles or nearly so, by means of the tracks of the Allentown Railroad, jointly leased and operated by the two companies. The Reading system here furnishes the Central an intermediate link connecting with the Western Maryland, Cumberland Valley, Norfolk and Western, Baltimore and Ohio, and other systems.

Here again the same conditions of through routes and joint service in the interchange of traffic, as well as the conditions of non-competitive local carriage, prevail as at Bound Brook and South Bethlehem. And at Tamaqua a branch of the Lehigh Coal and Navigation Railroad, leased to the Central, connects with the Little Schuylkill Branch, a leased line of the Reading system, and the same conditions of through routes and traffic interchange apply as at other points.

The next and the last point of intersection is at Hauck's Switch and Tamanend where a leased line of the Central intersects with the Catawisssa Branch, a leased line of the Reading System, not penetrating any part of the anthracite regions.

Here again, in a large way, the conditions of joint through routes and joint service in the interchange of traffic, as well as the conditions of non-competitive local service, pertain as at the other points before mentioned, the Reading's Catawissa branch supplying an intermediate line connecting the Central with the systems of the

New York Central and Erie lines and with the lines of the Buffalo, Rochester and Pittsburgh Company, and other systems.

3. THE CONDITIONS PREVAILING PRIOR TO THE ACQUISITION BY READING COMPANY, IN JANUARY, 1901, OF ITS INTEREST IN THE SHARES OF THE JERSEY CENTRAL, AND THE VOLUME OF TRAFFIC CARRIED BY THE READING SYSTEM AND DELIVERED TO THE CENTRAL AT THE POINTS OF INTERSECTION BEFORE AND SINCE THAT TIME.

The status of the Reading and the Jersey Central systems as connecting and supplementary railroads, dependent upon each other for traffic between New York and Philadelphia, and so mutually serviceable in the handling of traffic between New York and western points, is so obvious and, looked at in a large way, so advantageous to the public as well as to both companies, that it is not strange that those interested in these properties should endeavor to assure against disruption so natural a business connection. That status and relationship dates back to a time long prior to any suggestion of coal combination.

The Allentown Line to the West, existing in the sixties and later, used the Jersey Central from New York and the Reading from Allentown. This antedated any Philadelphia connection. The New York and Philadelphia New Line, opened in 1876, included the Jersey Central from New York to Bound Brook, thence over the Delaware and Bound Brook to the Delaware and thence over the North Pennsylvania Railroad into Philadelphia. The North Pennsylvania and the Delaware and Bound Brook became parts of the Reading system in the late seventies and the original tripartite agreement of the three roads between New York and Philadelphia became an agreement between the Reading and the Jersey Central. The relation between these two connecting railroads, so important to each, naturally encouraged a closer alliance.

The purchase of Jersey Central stock by the Reading Company in 1901 was the latest form in which the interdependence of the two railroads as connecting roads was recognized.

John F. Auch, then general freight agent of the defendant Philadelphia and Reading Railway Company, in his testimony described the origin, growth and development of the interchange of traffic between the Jersey Central and Reading systems (Record, Vol. 4, pages 667-681. He testified (page 668):—

> "I think it was in 1879 that the Philadelphia and Reading Railroad Company leased the North Pennsylvania Railroad. We found, when that lease was made, that there had been relations established prior to the leasing of the North Penn., between the Central Railroad Company of New Jersey, and the North Pennsylvania Railroad Company. In 1876 the Delaware and Bound Brook was opened, and, of course, the Philadelphia and Reading Railroad Company acquired that portion of its line with its lease of the North Pennsylvania Railroad." * * * (Page 669). "At that time, of course—say in 1884, we, that is, the Philadelphia and Reading Railroad, by reason of its lease of the Catawissa and Williamsport, had established a connection with the Lehigh and Susquehanna Division of the Central Railroad of New Jersey at Tamanend or Hauck's Switch which is practically one and the same place. In 1884, the first lease made between the Philadelphia and Reading Railroad Company and the Central Railroad of New Jersey was consummated, and immediately after the making of that lease the Philadelphia and Reading and the Central Railroad of New Jersey began the establishment of joint through rates and routes. Prior to that time the Central Railroad of New Jersey, as I have previously stated, had no joint rates extending to territory beyond its own rails. The Philadelphia and

Reading was in practically the same position. The only connection that we had with any other line was that obtained through the acquisition of the Catawissa and Williamsport, which gave us a connection with the Delaware, Lackawanna and Western, at Rupert. We had no other connection except that which was obtained with the Lehigh Valley Railroad at Allentown, via Reading and Allentown, that is, the East Pennsylvania Branch. We did undertake to handle through traffic in a limited way with the Lehigh Valley, who had enabled us to reach limited territory in New York State via Waverly.

"Q. And the Erie Railroad? A. The Erie Railroad. The opening of the Perkiomen Railroad enabled us to make that connection, so that during the Centennial, in 1876, through passengers and through traffic were handled via Waverly and the Erie road via Allentown and via the Perkiomen. The lines were further extended in about 1884—I could not give you the exact date—by the building of the Beech Creek and Fall Brook.

"Q. Connecting with the New York Central System? A. Now in the New York Central, connecting with the Philadelphia and Reading at Newberry Junction. The building of those lines gave us a direct connection at Newberry Junction with the New York Central system through the Fall Brook, and put us into the bituminous coal regions, in the Beech Creek and Clearfield districts. Then in 1886 our facilities were further enlarged by the building of the Baltimore and Ohio Railroad, or the extension, rather, of the Baltimore and Ohio Railroad from Baltimore to Philadelphia and connecting with the Philadelphia and Reading in this city. In 1891 the Philadelphia and Reading extended its line somewhat by building a bridge over the Susquehanna River at Harrisburg and building between Harrisburg and Bowmandale, giving us a through road

west as far as Shippensburg. At Shippensburg we connected with the Western Maryland Railroad, and over the Western Maryland we carried to a connection with the Baltimore and Ohio Railroad at Shippensburg and Hagerstown. Now to go back to 1875, I think I have already stated that the traffic of the Philadelphia and Reading Railroad was limited at that time to its own rails. Its principal business at that time was the transportation of anthracite coal from Schuylkill County to tide, or Philadelphia.

"Q. Tide at Philadelphia? A. Yes. There had, of course, been some growth in the development, that is industrial development in the Schuylkill Valley, and it is my recollection that the market afforded at Philadelphia even for transportation for the anthracite coal did not properly take care of the mine productions and there was continual pressure, both from the industries and the mining industries, to enlarge and afford more extended markets. That pressure resulted, as I have previously stated, in the establishment in 1884 of a number of joint routes and what is called co-operative fast freight lines, operating over the Central Railroad of New Jersey and the Philadelphia and Reading, via the several junction points, that is, via Allentown, via Tamaqua, via Tamanend or Hauck's Switch, via Bound Brook and via Bethlehem. The direct connection with the Central Railroad of New Jersey at Allentown was not effected, though, until 1890. At that time what was known as the Allentown Terminal Railroad was opened and afforded the Philadelphia and Reading and the Central Railroad a direct physical connection at that point. Prior to that time, as I have already stated, the business had to be handled between Allentown and Easton by the Lehigh Valley.

* * * * * * *

"We were absolutely without any means of successfully competing for or handling any traffic originating in the vicinity of Philadelphia, for New York, because the route by Allentown was circuitous and it was impossible to make the time that was essential to enable us to successfully compete for business between Philadelphia and New York. The same might be said with respect to the Lackawanna route as serving the territory north and west of Reading. It was a slow route. We were interfered with more or less by the intervention of the Lehigh Valley there, a third party, to handle the business and the facilities were not very good. They did not undertake to run through cars in those days, like they do now, and never thought of running through trains, so that it meant a transfer at Phillipsburg and another transfer at Allentown, en route between New York and its ultimate destination, even on the line of the Philadelphia and Reading road. From 1879, when the Philadelphia and Reading leased the North Pennsylvania Railroad, which effected this connection with the Central Railroad of New Jersey via Bound Brook, there was a steady growth of traffic interchange between the Philadelphia and Reading Railway territory south of Reading and in the vicinity of Philadelphia. This territory south of Reading was advanced in industrial development and we could not begin to give the manufacturers located on the line of the Philadelphia and Reading Railroad the markets which were required for the output of those concerns. I believe that those demands made upon the Railroad Company for enlarged distributing facilities were instrumental largely in determining the policy of the company in leasing first the North Pennsylvania Railroad. We were threatened, that is, the company was threatened, between 1875 and 1879 with the loss of a number of industries that had located in the Schuylkill Valley on the supposition that

they would get proper transportation facilities. Then we had the advent of the Pennsylvania's line up the Schuylkill Valley. I do not remember just what date that was, but that only tended to disturb matters from an industrial point of view, so far as those industries located on our line were concerned. We had at that time, as I previously stated, no joint rates in connection with the Pennsylvania Railroad, nor any others, except as I have explained, subsequent to 1884.

* * * * * * *

"The relations between the Philadelphia and Reading Railway Company and the Central Railroad of New Jersey, bringing us up to 1901, were the outgrowth of the growth in traffic, *and there has been no material change in the relations between the Central Railroad of New Jersey and the Philadelphia and Reading since 1901; that is to say, that all of those arrangements for through traffic had been consummated prior to 1901. There has not been a new arrangement made since that time.*

"Q. Give us a general idea of the volume of traffic which was interchanged between the two companies at these various points? Give us just a general idea; signify whether it was important or not. A. *My judgment is that it is vitally important;* that in tonnage it would be difficult for me to give you an estimate as to what it is worth from a tonnage standpoint, but I take it that that has already been presented.

"Q. State generally about the interchange of merchandise and bituminous coal traffic over the New Jersey at Hauck's, and Allentown, Bethlehem, Philadelphia and so forth. A. I would say the value of the tonnage interchanged between the Central Railroad of New Jersey and the Philadelphia and Reading Railroad in dollars and cents *is at least sixty per cent. of its entire business*, that is, its gross receipts. That includes bituminous coal, general merchandise and

all the traffic interchanged. I am not figuring or considering in any way the passenger traffic.

"Q. These proportions comparatively existed prior to 1901, I mean in the importance of the volume of the traffic? A. The facility was in existence prior to 1901. Of course, there may have been some growth due to the general growth in business.

"Q. The evidence is that there has been a vast growth since, but that there was a valuable and important interchange prior to 1901 at those several points of junction? A. Oh, yes.

"Q. Which was invaluable to the Philadelphia and Reading Railway system? A. Yes, sir, *I should say it was invaluable, that the interchange was necessary to their existence.*"

Prior to the acquisition of the Central shares there were in existence three several different contracts establishing joint through routes for the interchange of interstate traffic.

The first (Record, Vol. 4, page 528, paragraph IX), dated March 30th, 1876, between North Pennsylvania Railroad Company, Delaware and Bound Brook Railroad Company, and the Central Railroad Company of New Jersey, for:—

"The opening a new line of railroad for trade and travel between the cities of New York and Philadelphia, which said line is to be composed of the North Pennsylvania from Berks Street Station in Philadelphia to Jenkintown, and of the branch railroad from Jenkintown to the middle of the Delaware River southward of Yardleyville; * * * of the Delaware and Bound Brook Railroad, extending from said point in the Delaware River to a point in the Central Railroad of New Jersey west of Bound Brook, * * * and the Central Railroad of New Jersey extending from said point to the Hudson River at Jersey City, and also one mile of ferry be-

tween Jersey City and New York * * * making together a continuous line of railroad and ferry, eighty-eight and four tenths (88 4/10) miles in length."

* * * * * * *

"2. After the making of the said agreement the said North Pennsylvania Railroad Company and the said Delaware and Bound Brook Railroad Company, severally made leases of their respective lines of railroad, branches and appurtenances to The Philadelphia and Reading Railroad Company, which thereby assumed the obligations of the said 'New York and Philadelphia New Line' agreement. The said leasehold interests so acquired, were sold and conveyed pursuant to the said decree and became vested in the defendant Railway Company, which as the successor of the said parties, is a party to all the provisions of the said 'New York and New York New Line Agreement.'

"The *Second* (Record, Vol. 4, paragraph X, page 530), dated June 13th, 1898, between The Baltimore and Ohio Railroad Company, the Philadelphia and Reading Railway Company, the Central Railroad Company of New Jersey, the Staten Island Rapid Transit Railroad Company and the Baltimore and New York Railroad Company, who entered into an agreement 'for the purpose of facilitating the interchance of railroad traffic of every kind and nature over the "New Line" hereby established wherein, among other things, it was covenanted':—

"Article One.—The lines of the Baltimore Companies, extending from the city of Washington through the city of Baltimore and into the city of Philadelphia, by way of East Side Junction to Park Junction, in Philadelphia; the lines of the Reading Companies, extending from the said Park Junction in the city of Philadelphia to Bound Brook Junction, N. J.; the lines of the Central Company, extending from Bound Brook Junction aforesaid to the waters of New York bay at

Jersey City, and the lines of the Staten Island Companies, extending from the city of Washington through waters of New York Bay, at St. George, Staten Island, N. Y., *shall be used as a system of connecting lines of railroad forming a through route*, hereafter in this agreement designated as the 'New Line,' for the carriage of railway traffic, and the said term 'New Line,' whenever and as often as the same shall be hereinafter mentioned, shall be held and taken to mean and refer to the system of connecting lines of railroad in this article specifically defined and described."

* * * * * * *

(Page 535). "This contract shall take effect, as of the first day of June, 1898, and continue in force and effect *for the period of one year from the date hereof*, and thereafter until terminated *by either party* on giving *sixty days* notice to the others of its purpose to withdraw from the same." * * *

Right here can at once be appreciated the state of alarm in which Mr. Baer has testified to finding himself, on being told by Mr. Twombley that the holders of a majority of the Central shares were negotiating for their sale to the Baltimore and Ohio; for that company being in control of the Philadelphia and Reading Railway Company's outlet to New York waters, *within sixty days* the latter company would have found itself crushed, as between the upper and nether millstones, and its traffic, which had been so assiduously built up by the energy and foresight of its officials, producing for the first time in its history and that of its predecessor a fair degree of prosperity, would surely have been dissipated forever.

The *third* (Record, Vol. 4, page 535, Paragraph X), dated also June 13th, 1898, between the Baltimore and Ohio Railroad Company, the Western Maryland Railroad Company and the Philadelphia and Reading Railway Company, whereby they entered into "an agreement" for the purpose of facilitating the interchange of railroad traffic of every kind and nature over the line hereby established,

and "hereinafter" described as the "Shippensburg route," wherein it was, among other things, covenanted:—

> "ARTICLE ONE.—That the lines of the Baltimore Company, extending westward from Cherry Run, in West Virginia, and its connections, including its lines of the West Virginia Central and Pittsburgh Railway Company and its connections, and the line of the Maryland Company, extending from Cherry Run, W. Va., to Shippensburg, Pa., and the lines of the Reading Company *with their connections,* extending from Shippensburg to various points in Pennsylvania and New Jersey, shall be used by the parties hereto as a system of connecting lines of railroad forming a through route for the interchange of freight traffic, to be known as the Shippensburg route."
>
> * * * * * * *
>
> "537. ARTICLE SEVEN.—This agreement shall take effect as of the first day of June, 1898, and continue in effect one year, at thereafter until any of the parties hereto shall have given *thirty days'* notice in writing of its desire to terminate the same."

By the negotiation of this contract and the establishment of this joint route, its first and perhaps its most important step on its path towards a moderate prosperity, the Philadelphia and Reading Railway Company made a most notable contribution towards the development of interstate commerce. (See Henderson's testimony.) It opened up to the manifold industries along the Jersey Central lines and those of the Reading System, the vast bituminous coal fields of Western Maryland, West Virginia and Southwestern Pennsylvania, in competition with those of the Clearfield and Buffalo, Rochester and Pittsburgh regions of Pennsylania, and this a limited supply (Henderson) as your Honors have seen in a recent case involving a question which arose under the "Act to Regulate Commerce." It also opened a new through fast freight route between the lines of the Central lines and their eastern tributaries and those of the entire Reading Railway system, to and from all points

West and Southwest reached via the Baltimore and Ohio Railroad and its numerous connecting lines.

George Zeigler, Controller of the defendant Philadelphia and Reading Railway Company, testified (Record, Vol. 4, pages 660-661):—

"Q. I want you to read into the record the amount of tonnage delivered over the tracks of the Philadelphia and Reading Railway Company and Central Railroad Company of New Jersey for transportation by way of Hauck's Switch, Allentown and Bound Brook, from July 1st, 1899, to June 30th, 1908, inclusive. I want to show particularly the tonnage first of 1900, which passed over the Central Railroad of New Jersey by way of those various junction points. A. Via Park Junction for the year ending June 30th, 1900, was 511,101 tons, ten hundred-weight, for June 30th, 1901, 488,509 tons, six hundred-weight.

"Q. Now take the same two periods for the interchange at Hauck's. A. June 30th, 1900, for Hauck's was 839,382 tons, fourteeen hundred-weight; for 1901, 944,013 tons, four hundred-weight. Via Allentown, for June 30th, 1900, 105,397 tons, three hundred-weight; for 1901, 165,561 tons, six hundred-weight.

"Q. Omitting the intervening periods, tell us what that interchange amounted to for the year 1907 and 1908 respectively at those various points. A. June 30th, 1907, via Park Junction was 1,594,515 tons, nineteen hundred-weight; for 1908, 1,503,388 tons. For Hauck's, was 1,197,167 tons, nine hundred-weight; for 1908, 1,197,058 tons, twelve hundred-weight. Via Allentown, for 1907, 1,088,388 tons, four hundred-weight; 1908, 1,013,979 tons, four hundred-weight.

"Q. What were the total tonnages delivered by way of those various junction points from the year 1900 to the year 1908 inclusive? A. Via Park Junction, 8,859,559 tons, eight hundred-weight. Via

Hauck's, 9,853,034 tons, five hundred-weight. Via Allentown, 5,205,985 tons, sixteen hundred-weight.

"Q. The tonnage interchange at Hauck's was delivered to the Jersey Central directly at that point? A. Yes, sir.

"Q. So at Allentown, the tonnage delivered to the Central was delivered to that company at that point? A. Yes, sir.

"Q. As to the tonnage by way of Park Junction, it was carried forward over the tracks of the Philadelphia and Reading Railway and delivered to the Central Railroad Company of New Jersey at Bound Brook Junction? A. Yes, sir.

"Q. A short distance west of Bound Brook? A. Yes, sir."

Charles E. Henderson, second vice-president, in charge of traffic, of the Philadelphia and Reading Railway Company, testified (Record, Vol. IV, page 582):—

"Q. From your knowledge of the territory tributary to the Philadelphia and Reading Railway Company proper, and its various railroad connections, I would like you to describe the relations in the matter of interchange of traffic which existed between the Central Railroad Company of New Jersey and the Philadelphia and Reading Railway Company, prior to January, 1901. You can use the maps there, and point out the various points of connection, routes of traffic, and so forth, beginning at the northwestern end and coming around until you strike the road connecting the B. & O. Give a brief, general description. This is the condition prior to January, 1901. A. Outside of the coal traffic the Reading Railway has no access to the business of New York, except by passing over some other lines to New York harbor. The line over which most of the, in fact nearly all of the traffic of the Reading Railway passes to New York, is the line of the Central Railroad of New Jersey, from Bound Brook to New York. It

draws its New York westbound traffic from that line, for Philadelphia and points south thereof, over the line of the Central Railroad of New Jersey, from Jersey City to Bound Brook.

"Q. And the reverse? A. The traffic which it gathers on its own line from the south and southwest ——

"Q. And connections? A. And from its connection south, passes over the line of the Central Railroad of New Jersey, from Bound Brook to New York, in the opposite direction. That traffic is very large, both passenger, freight, and merchandise.

"Q. You are describing conditions which existed prior to 1901? A. Yes, sir, that condition existed prior to 1901, and since 1901. It exchanges also a very large amount of traffic to and from New York waters, which passes over the line of the Central Railroad of New Jersey to Allentown; then west by Reading, and on west to Shippensburg, and over the lines of the Western Maryland, and Norfolk and Western, and Baltimore and Ohio, to the West. It carries, in the reverse direction, a very large traffic. That volume of traffic exchanged at Allentown is much larger even than that which is exchanged at Bound Brook. They carry a very heavy bituminous coal traffic from the line of the Baltimore and Ohio Railroad, and all their western fast freight lines and other business, a large amount.

"By Mr. McReynolds:

"Q. Are you speaking prior to 1901 still? A. Yes, sir, that existed both before and since 1901. It has increased through the formation of the Western Maryland new line, which enabled it to carry its traffic more expeditiously. It has been greater in volume in recent years than early, but it existed both prior and subsequent to 1901. The Philadelphia and Reading Railway exchanges a very large amount of traffic coming from the New York Central lines, from the West, which comes to the Reading at New-

berry Junction and goes over the Catawissa line, and is exchanged at Tamanend Junction or Hauck's Switch. This coal from the Buffalo, Rochester and Pittsburgh Road, grain and merchandise of various kinds, the fast freight line business to and from the West, merchandise from New York over that road, west, is distributed especially over the New York Central lines.

"By JUDGE CAMPBELL:

"Are there not also Erie connections at Corning for points west? A. We connect in the traffic with the Erie Road, what we call the Scranton, Erie business, over the line of the New York Central Road to their junction with the Erie. The business goes in both directions in that case, the same as in the others. There is some business that we exchange with the Central Railroad of New Jersey at Tamaqua, but that is less in volume. There is another junction point of the Atlantic City Road with the Central Jersey, where more or less business is exchanged between the two lines.

"Q. At Winslow Junction, in New Jersey? A. At Winslow Junction in New Jersey.

"Q. Let me call your attention also to a connection at Bethlehem. A. I failed to mention the junction point of the North Penn Railroad with the Central Railroad of New Jersey at Bethlehem, for points in the upper anthracite region, Scranton, Wilkes-Barre, and along there.

"Q. Running down on the line of the Central Railroad of New Jersey? A. Yes, sir, in the Lehigh Valley. A large amount of business is exchanged with the New Jersey Central in both directions at Bethlehem.

"Q. That existed prior to 1901? A. Prior to and subsequent to 1901.

"Q. How about the Perkiomen connection near Allentown? A. The Perkiomen Junction at Allentown is an alternate route with the Bethlehem line, and the grades are a little more favorable on the

Perkiomen Road, and that is used for heavy traffic there. It is merely an alternate route with the Bethlehem line.

"Q. It is a point reached for the exchange of their traffic between the two systems? A. Yes, sir.

"Q. By way simply of illustration, not going into all the detail, but taking the bituminous traffic alone the interchange by way of Park Junction with the B. & O. in Philadelphia, by way of Hauck's Switch, of the Beech Creek and Clearfield, and Buffalo and Rochester and Pittsburgh, and via Allentown and the Shippensburg connection, kindly state the growth of that interchange from 1900, prior to the acquisition of the shares of the Central Railroad of New Jersey by the Reading, up to and including 1908. Show the nature and extent of that interchange of traffic. A. Via Park Junction.

"Q. Describe what that means. A. Park Junction is a connection of the Baltimore and Ohio Railroad with the Philadelphia and Reading Railway in Philadelphia. We always speak of that business as the Park Junction Route business. The first full fiscal year shown here, which is 1901—this is bituminous coal—was 488,000 tons. 1907-8 is 1,503,000 tons.

"Q. In the meantime there has been a gradual increase? A. Yes, sir, and has gone from the one figure to the other by a gradual process. By Hauck's Switch ——

"Q. Describe what that means. A. Hauck's Switch Junction is a connecting point between the Central Railroad of New Jersey and the Philadelphia and Reading Railway over which the traffic from the Beech Creek Road to Central Jersey points, east of Hauck's Switch, including New York City, comes. This traffic in 1900 was 944,000 tons. In 1907 was 1,197,000 tons.

"Q. Go on to the Allentown. A. The bituminous coal coming by Allentown from the B. & O. was in 1900, 165,000 tons. In 1907-8 was 1,013,000 tons.

"Q. In the meantime there has been a gradual enlargement and increase at each of these points? A.

Yes, sir, every year there was an increase until the last year.

"Q. I wish you would look at that map, and look carefully and trace the main lines of the Central Railroad of New Jersey, so you can get a clearminded comprehension of it, and the main line traffic of the Philadelphia and Reading Railway system, in relation to each other, if you have not got that clearly in your mind? A. I have it distinctly in my mind.

"Q. Are those lines of railroad practically, or substantially, parallel or competing with each other, for the class of business you have described, or any other than this mere incidental business? A. The business interchanged between these lines is probably from fifty to one hundred fold greater than that for which they compete.

"Q. Answer the first question. Are they at all parallel? One of them runs along one valley, at the bottom of one water shed, and the other in a totally different one. They compete for an extremely limited amount of traffic.

"Q. At these local points of connection? A. Yes, sir.

"Q. These local points of connection you have mentioned? A. Yes, sir, they exchange with each other a volume of business, as I have stated, probably fifty fold greater.

"Q. Fifty fold? I thought it was several hundred fold? A. I have not gone into the calculation. The one is an *insignificant* thing, and the other is a *business of a tremendously large volume.*

"Q. Are these through routes, over which this through traffic is interchanged, competitive by any route controlled by one line, with the routes controlling the other? A. Only in an insignificant degree.

"Q. They are complementary to each other, are they not? A. They supplement each other.

"Q. Without the use of the Jersey Central terminals, if they were in the hands of parties not interested in, or antagonistic to the Philadelphia and Reading Railway

system and its ownership, what would be the consequence. A. The Philadelphia and Reading Railway might be largely shut out of its business to and from New York, if it were in the hands of other companies.

"Q. And the traffic which is naturally tributary from Reading territory, to and from New York, that would be driven to other lines? A. Largely, yes, sir.

"Q. Since the acquisition of the major portion of the shares of the Jersey Central Railroad Company by the Reading Company, one of the defendants here, has there been any change in the organization of the two roads, the Philadelphia and Reading Railway, and the Jersey Central Railroad, as to their being used independently and separately? A. I think they fight each other harder now then they did before.

"Q. Has there been any change in the personnel, so that the Reading people control and undertake to operate the New Jersey Central Company in regard to the distribution of the traffic? A. They have the same president.

"Q. Is that the only exception? A. That is the only exception."

"Q. State whether the Jersey Central maintains an absolutely and separate and independent organization? A. It does, yes, sir.

"Q. The accounting departments are all separate? A. Yes, sir.

"Q. The operating departments absolutely separate? A. They have the same purchasing agent and same president.

"Q. The purchasing agent is not part of the operating department is he? A. No, sir.

"Q. He does not control shipments? A. No, sir, he does not. So far as their operating department is concerned, it is entirely separate. So far as their traffic department is concerned, it is entirely separate. So far as their accounting department is concerned, it is entirely separate. They have the same president, and they have the same purchasing agent. That far, they are not connected with each other."

See also testimony of Mr. George F. Baer (Record, Volume 5, pages 1184-1187), quoted *supra*, pages 8 to 11.

4. THE LINES OF THESE RESPECTIVE RAILROAD COMPANIES DO NOT NATURALLY AND SUBSTANTIALLY COMPETE WITH EACH OTHER FOR INTERSTATE TRAFFIC.

Considering all the facts in their natural, reasonable and practical aspect and giving them their appropriate relative significance—as was done in United States *vs.* Union Pacific Company, 188 Fed. Rep., 102—it seems plain that these two systems are not and cannot be competitive for the same traffic and that their natural and most conspicuous relation is to form complementary joint through routes for the interchange of traffic, with no tendency to restrain trade and commerce among the States, but rather to enlarge and facilitate their joint powers to compete with the other systems of the country.

It is true that they are each carriers—in large amounts—of anthracite coal, but the extension of through lines of traffic in the development of the commerce of the country has long since made them large carriers of other merchandise and the anthracite coal that moves to a common market from their respective lines is but a small percentage of their gross tonnage.

The anthracite coal deposits are widely separated and divided into five or six separate and distinct basins, located miles apart and divided from one another by mountain summits and ranges and other obstacles.

Neither of these roads reaches or serves the "anthracite coal fields," but on the contrary it is proved that the lines of each penetrate only *portions* of separate and distinct fields not penetrated by the other and severally reach only some, but not all, of the collieries located in the separate fields into which they respectively run.

It is not true as stated (page 80 of Government's Brief), that Coleraine Colliery, Kaska William Colliery, and Mary D. Colliery, "are tributary to the lines of both the Philadelphia and Reading Railway and the Central Railroad of New Jersey."

Coleraine Colliery is located on a branch railroad owned by the proprietors of the land on which the colliery is located, and is absolutely dependent upon the P. & R. Railway for its outlet to the markets.

Even the Jersey Central owns some disconnected tracks to the northward of this colliery, belonging to one of its leased lines, long since disconnected from the Jersey Central system on account of the prohibitive expense of operation, and there is a colliery located there which is also wholly dependent upon the tracks of the Philadelphia and Reading Railway for its outlet to the markets.

Kaska William Colliery and Mary D. Colliery are located on branch lines owned by the Lehigh Coal and Navigation Company as the evidence shows, but are also dependent entirely upon the Philadelphia and Reading Railway for their outlet to the markets, for the sole connections of their colliery branches of the Navigation Company are with a branch of the Philadelphia and Reading system. The lands on which these collieries are located belong to the Navigation Company. The Central reaches none of them, and can only reach either of them by means of some satisfactory traffic arrangement with Philadelphia and Reading and the traffic produced from them is, therefore, altogether non-competitive.

It is in no sense true, as alleged in this brief (page 81), that "The collieries of the Lehigh Coal and Navigation Company in the Southern Field, ten in number, are also tributary to both the Philadelphia and Reading Railway and the Central Railroad of New Jersey."

It is true, however, that the Panther Creek Railroad, which reaches some of the Navigation Companies, has a track connection at Tamaqua, with one of the branches of the Reading system, and while it would be physically *possible* to move coal from Navigation territory by that unnatural route, it is so economically *impossible* that the traffic can never become competitive. For the Lehigh Coal and Navigation Company owns the Lehigh and Susquehanna Railroad, leased to the Jersey Central for a long term of years, for a rental based upon its gross receipts, in which the eastbound tonnage is perpetually bound to that

route. It would be contrary to all nature for the Navigation Company to move the product of its collieries out of its way and in an opposite direction to Tamaqua, depriving its own line of the long haul revenue as well as of the revenue of its own railroad branches, and at a necessarily much higher rate than its own line can well afford; to say nothing of leaving the short and easy haul on its own system for the roundabout and tortuous route of the Reading. Counsel are again mistaken when they assert that "all the coal which that (the Reading) railroad brings to New York harbor for the Philadelphia and Reading Coal and Iron Company comes by just as roundabout a course." For all the coal tributary to the Reading constantly moves in the direction of the markets by the shortest available route—while that of the Navigation Company's collieries, if going via Reading lines, would have to move first away from the market in the opposite direction, to the junction point, and then have almost double as far to go as by the natural route via Navigation Company's railroad leased to and operated by the Central.

When we come to consider what is competitive traffic between two or more railroads we can only regard that as competitive which can reasonably or economically become tributary to both or either, and not that which, by overcoming physical and ecomonic obstacles, *might* or could *possibly* reach the other, regardless of cost, convenience or time.

In the sense propounded by counsel we might take any colliery located at the remotest point, which *could*—that is to say, it is physically *possible*—by paying enough for intermediate carriage—finally reach the lines of the Reading system and be thence carried to any common point.

The traffic from Navigation collieries to any common point reached by both Reading and Central is, therefore, naturally wholly tributary to the Central and is necessarily non-competitive as between these systems.

And so, when the Navigation Company as a producer and miner sells coal for delivery to local points on the

Reading system, not reached by the Central at all, that traffic becomes tributary solely to the Reading and is also necessarily non-competitive.

When they come to consider (page 83) the collieries on the Delaware, Susquehanna and Western Railroad, they drift still farther to sea; these collieries are not and never were tributary to the Central, though at one time many years since, that company had a track connection—which counsel admits "within the last seven or eight years the Central has ceased to keep up."

It is easy to assert that "The output of these collieries served by this gathering road and of others which it was in a position to serve, might, therefore, have gone to New York harbor and other markets over either the Philadelphia and Reading Railway or the Central Railroad of New Jersey among other lines." But confronted with the geographical and economic facts of the whole situation, this assertion is without significance. Supposing they might have done so, that is to say, gone to New York harbor via Reading, for instance, in violation of all economic law and the natural trend and flow of the stream of traffic—the fact is this traffic *did not*, as it *could not* naturally, so move, and was not so moving when the Reading's acquisition of Central stock was effected and it was then and is now wholly tributary, by nature and in fact, to the lines of the Lehigh Valley Railroad Company, though there might be possibly some of the products shipped to non-competitive local points on other lines.

There is rather indirect reference in the testimony of Mr. Harris, and also in that of Mr. Baer, to the fact that there was at one time a traffic arrangement between the old Philadelphia and Reading Rail*road* Company before the foreclosure, for the interchange of business at Roan Junction to and from Reading local markets. But Mr. Harris explained that anthracite coal could not be carried by that route on account of the prohibitive rate and cost, and, limited as the arrangment was, it had to be abandoned.

It, however, is not in existence now, and was not in

January, 1901, and it is shown that the traffic from these collieries was never served by the Central Railroad of New Jersey on account of natural prohibitive conditions which prevented them from carrying their own traffic over their own rails from that region.

5. THERE IS NO EVIDENCE OF ANY DIMINUTION OF THE TRAFFIC OF EITHER PHILADELPHIA AND READING RAILWAY COMPANY OR THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; BUT, ON THE CONTRARY, AS APPEARS FROM THE PUBLISHED AND FILED REPORTS OF THESE COMPANIES, FROM WHICH THE FOLLOWING TABLES ARE COMPILED, THE GROSS TONNAGE AND THE TONNAGE OF ANTHRACITE COAL HAS MATERIALLY INCREASED SINCE 1901.

Philadelphia and Reading Railway Company.

Statement showing gross tonnage and tonnage of anthracite coal carried during fiscal year ending June 30th, 1900, to 1908, inclusive.

Year.	Total.	Anthracite Coal.	
1900	24,404,294	10,672,556	
1901	30,077,465	10,523,891	
1902	31,966,741	9,465,953	Affected by strike.
1903	34,598,177	7,932,891	
1904	36,017,087	11,324,624	
1905	39,909,073	12,029,459	
1906	44,698,314	11,856,871	
1907	48,828,344	13,223,780	
1908	43,603,585	13,537,464	

Central Railroad Company of New Jersey.

Statement showing gross tonnage and tonnage of anthracite coal carried during fiscal years ending June 30th, 1900, to 1908, inclusive.

Year.	Total	Anthracite Coal.	
1900	16,668,997	6,632,075	
1901	16,966,654	6,853,063	
1902	17,319,651	5,988,697	Affected by strike.
1903	19,539,723	5,845,641	
1904	21,313,977	7,680,595	
1905	22,843,429	8,007,406	
1906	25,416,139	7,807,271	
1907	28,063,145	8,763,169	
1908	26,240,555	9,663,927	

6. THERE IS NO EVIDENCE OF ANY DIMINUTION OR RESTRICTION OF THE TRADE OR COMMERCE OF EITHER THE PHILADELPHIA AND READING COAL AND IRON COMPANY OR THE LEHIGH AND WILKES-BARRE COAL COMPANY; BUT, AS APPEARS FROM THE RECORDS OF THESE COMPANIES FROM WHICH THE FOLLOWING TABLES ARE TAKEN, THE TONNAGE OF ANTHRACITE COAL OF EACH OF THESE COMPANIES HAS MATERIALLY INCREASED SINCE 1901.

The Philadelphia and Reading Coal and Iron Company.

Statement showing tonnage anthracite coal mined and purchased for the fiscal years ending June 30th, 1901 to 1908, inclusive.

Year.	Mined.	Purchased.	Total.	
1901	8,016,935.18	967,434.11	8,984,370.09	
1902	6,968,566.03	1,034,290.02	8,002,856.05	Affected by strike.
1903	6,299,449.04	1,008,252.08	7,307,701.12	
1904	8,707,508.02	1,388,534.17	10,096,042.19	
1905	9,438,665.17	1,184,349.11	10,623,015.08	
1906	9,132,353.14	1,024,050.17	10,156,404.11	
1907	10,034,713.02	1,107,848.07	11,142,561.09	
1908	10,218,392.05	1,083,681.19	11,302,074.04	

The Lehigh and Wilkes-Barre Coal Company.

Statement showing tonnage anthracite coal mined and purchased by years, January 1st, 1901, to December 31st, 1908.

Year.	Mined.	Purchased.	Total.	
1900	2,822,709	344,163	3,166,873	
1901	3,414,735	577,001	3,991,736	
1902	1,867,611	515,373	2,382,984	Affected by strike.
1903	3,782,008	1,074,289	4,856,297	
1904	3,556,788	959,171	4,515,959	
1905	3,844,564	1,075,072	4,919,637	
1906	3,474,310	812,901	4,287,212	
1907	4,071,931	939,119	5,011,051	
1908	4,320,758	853,885	5,174,643	

THE ACQUISITION BY READING COMPANY OF THE SHARES OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY WAS NOT EFFECTED BY A COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES AND IT DOES NOT ACCOMPLISH ANY RESTRAINT OR MONOPOLIZATION OF SUCH TRADE OR COMMERCE.

The actuating intent and predominating motive in this acquisition was to preserve to the Philadelphia and Reading Railway its traffic arrangements with the Jersey Central and the direct effect of it was to preserve them. The Reading Company was alone in the transaction and it was not induced by any understanding or agreement or combination with other defendants and was accomplished without their knowledge.

Since the argument of this case in the Court below, illuminating decisions of the Supreme Court have revealed the error of some of the Government's contentions as to the meaning of the statute and the decisions of that Court concerning those contentions, and it is now unquestioned that "*judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the Act.*" and that the statute evidences "*the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.*" (Standard Oil Company *vs.* United States, 221 U. S., 1.)

The Act cannot reasonably be construed as prohibiting

"every contract or combination in restraint of competition." The answer to the question "Does the contract unduly restrain interstate or foreign commerce" cannot be reached through the test question "Does it eliminate or limit competition in any way?" Judgment must still be brought into play to determine whether or not trade or commerce is actually restrained through the restriction.

The brief of the Lehigh and Wilkes-Barre Coal Company in this case in the Court below so fully and ably discusses these propositions that the argument is here embodied in this brief.

What was said in a recent criminal case has equal application to this equity case respecting incidental transactions of this sort explainable on a perfectly rational basis, and the effect of which, if any at all, on interstate commerce, is most trivial and incidental. The case referred to is that of the Union Pacific Coal Company *v.* United States, 173 Fed. Rep., 737. In that case Mr. Justice Sanborn (subsequent to his very interesting opinion in the Standard Oil case) had the following to say respecting the scope and purpose of the Anti-Trust Act:

> "The act of July 2, 1890, does not denounce every combination to engage in or to conduct commerce among the states or with foreign nations, but those combinations alone which restrain that commerce. It does not denounce every combination which restrains that commerce, but those combinations only, the necessary effect of which is to stifle, or directly and substantially to restrict, free competition in that commerce. United States *v.* Trans-Missouri Freight Ass'n, 166 U. S., 290, 330, 339, 340, 17 Sup. Ct., 540, 41 L. Ed., 1007; Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 234, 20 Sup. Ct., 96, 44 L. Ed., 136; United States *v.* Joint Traffic

Ass'n, 171 U. S., 505, 576, 577, 19 Sup. Ct., 25, 43 L. Ed., 259; United States *v.* Northern Securities Company (C. C.), 120 Fed., 721, 722.

If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law. Hopkins *v.* United States, 171 U. S., 573, 592, 19 Sup. Ct., 40, 43 L. Ed., 230; Anderson *v.* United States, 171 U. S., 604, 616, 19 Sup. Ct., 50, 43 L. Ed., 300; United States *v.* Joint Traffic Ass'n, 171 U. S., 505, 568, 19 Sup. Ct., 25, 43 L. Ed., 259; Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 245, 20 Sup. Ct., 96, 44 L. Ed., 136; Whitwell *v.* Continental Tobacco Co., 125 Fed., 454, 458, 60 C. C. A., 290, 294, 64 L. R. A., 689, and cases there cited. There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce.

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. Vernon *v.* United States,

146 Fed., 121, 123, 124, 76 C. C. A., 547, 549, 550; United States *v.* Richards (D. C.), 149 Fed., 443, 454; Hayes *v.* United States (C. C. A.), 169 Fed., 101, 103; United States *v.* Hart (D. C.), 78 Fed., 868, 873, affirmed in Hart *v.* United States, 84 Fed., 799, 28 C. C. A., 612; United States *v.* M'Kenzie (D. C.), 35 Fed., 826, 827, 828; United States *v.* Martin, 26 Fed. Cas., 1183, 1184 (No. 15,731); People *v.* Ward, 105 Cal., 335, 341, 38 Pac., 945; People *v.* Murray, 41 Cal., 66, 67; State *v.* Hunter, 50 Kan., 302, 32 Pac., 37; Bradshaw *v.* State, 17 Neb., 147, 22 N. W., 361, 366."

In the discussion of this phase of the question, counsel for the Government assumed that the Anti-Trust Act should be construed as prohibiting "every contract or combination in restraint of competition," relying upon the case of Thomsen *v.* Union Castle Mail S. S. Co., 166 Fed. Rep., 251.

Now, it will be recalled that the Anti-Trust Act itself says no such thing and does not use the word "competition." There is no doubt that the Circuit Court, which decided that case, understood that it was bound to hold, nevertheless, that any contract or combination which in any way eliminates, restrains or limits competition is necessarily in restraint of trade or commerce. No cases in support of this proposition are cited, except the Northern Securities case and the National Cotton Oil Company *v.* Texas, 197 U. S., 115. Whatever is said in the latter case respecting the Federal Anti-Trust Act was merely *obiter*, because the case itself dealt only with the Texas statute, which in terms prohibited combinations in restraint of competition.

In the Northern Securities case, among the propositions which Mr. Justice Harlan stated as deducible from the earlier decisions of the United States Supreme Court were these:

(1.) "That every combination or conspiracy which would extinguish competition between otherwise

competing railroads engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the Act;

(2.) "That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce."

Of these two propositions the first is expressly confined to railroads. The second is impliedly so confined, because of the connection in which it comes and the fact that the case related to railroads; and this is confirmed by its origin, the language used being taken from the Joint Traffic Association Case.

Mr. Justice Harlan gives a list of the cases from which his several propositions are deduced.

The E. C. Knight Company case, the Hopkins case and the Anderson case (in each of which there was found no violation of the Act), give no support to the two propositions above quoted.

In the Addyston Pipe & Steel Co. case the court disposed of the objection that the contract or combination was formed only to protect the parties in securing prices reasonable to themselves and the public, simply by denying the fact, saying:

"The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed."

Montague v. Lowry, it is submitted, contains nothing pertinent to the present inquiry. The agreement there in question was condemned because "it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to members of the association, and it enhanced prices to the non-member."

These cases are very far from asserting that every contract or combination which eliminates or restrains competition, whatever its effect may be upon the development of trade or commerce, is a restraint of such trade or commerce for the purposes of the act.

The Trans-Missouri Association case and the Joint Traffic Association case were evidently the cases relied upon by Mr. Justice Harlan for the propositions above quoted, and attention may be confined to the latter, in which alone the question now pertinent (as applied to the business of railroads) was fully argued and was definitely passed upon.

In the last three pages of the opinion in the Joint Traffic Association case the court dealt substantially for the first time with the argument that such an agreement as was then before it (relating to railroads) was not in restraint of trade or commerce, although it concededly restrained competition. Mr. Justice Peckham states the question as follows:

> "Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads."

And the argument of counsel he states as follows:

> "They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree, and on a single point. They admit that if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale and in numerous forms without competition."

And then comes the following:—

> "The material considerations, therefore, turn upon the effects of competition upon the business of railroads, whether they are favorable to the commerce in which the roads are engaged, or unfavorable and in restraint of that commerce."

Is this last statement merely a continuation of the argument of counsel? Is it not rather the Court's statement as to the point upon which the question turns, intended to show how far the court agrees with the counsel and where the point of difference is? The court, as we read the opinion, assents to counsel's major premise that a restraint of competition is not necessarily a restraint of trade or commerce, and is such only when the restraint of competition is unfavorable to trade or commerce; and the rest of the opinion is directed against the contention (the minor premise) that the restraint of competition involved in this particular agreement was "favorable to the commerce in which the roads are engaged."

Assent to the major premise is a denial of the proposition that the Act "prohibits every contract or combination in restraint of competition."

In discussing the minor premise, Mr. Justice Peckham says:—

> "The natural, direct and immediate effect of competition is, however, to lower rates, and thereby to increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce."

NOTE.—This is the origin of Mr. Justice Harlan's second proposition above quoted.

Note the antithesis in the last words, "restrains instead of promoting trade or commerce." Whether

in the last preceding quotation, Mr. Justice Peckham was stating the view of the court or only that of counsel as to the point upon which the question turned, becomes unimportant when the force of these words is appreciated. They show that, in this respect, the views of counsel and of the Court were in accord. They show that the Court decided against the defendants, because it reached the conclusion that the agreement before it "restrained instead of promoting trade or commerce," or in other wards that it was unfavorable to the commerce in which the roads were engaged. They show that the Court assented that the crucial question as to the legality of the agreement was: Does it restrain or promote trade and commerce? or (the same question in substance), Is it favorable or unfavorable to trade and commerce? They show that the Court did not intend to dispute or question, but rather intended to assent to Mr. Carter's position, stated in the report of his argument as follows: "That it (the agreement) is in fact in restraint of trade or commerce must be shown before this action can be maintained."

Had the Court reached a contrary conclusion upon the crucial question above stated, could it, consistently with the view clearly shown by the opinion as it is, have decided against the defendants, holding substantially that though an agreement is favorable to trade and commerce, though it promotes, develops and increases trade and commerce, yet if it in any way eliminates or limits competition it restrains trade and commerce; that though from an economical point of view it does not operate in restraint of trade, yet from a legal view point it does?

It is submitted that he who wrote, and those who concurred in, the opinion in the Joint Traffic Association case could not hold such a view as that of the Court in the Thomsen case without a thorough change of mind. The court has substantially said that what promotes, or is favorable to, trade and commerce does not restrain it within the meaning of the Act.

It is submitted that the proposition that restraint of competition is always restraint of trade or commerce was not decided in the Trans-Missouri Association case, nor in the Joint Traffic Association case, except perhaps as to the business of railroads.

This review covers all the cases which either directly or by reference to the Northern Securities case were given by the Circuit Court as showing that the construction of the Act as stated had been settled by the Supreme Court of the United States.

No other case is found which it is thought can reasonably be cited as in support of that theory. And it is respectfully submitted that the Supreme Court has nowhere up to this moment decided that "the Act prohibits every contract or combination in restraint of competition," or, in other words, that anything by which any competition is ended, suspended or limited necessarily restrains trade or commerce.

The act cannot reasonably be construed as prohibiting "every contract or combination in restraint of competition."

Competition is not mentioned in the Act.

Restraint of competition may and often does restrain trade or commerce, but it does not always do so. If the United States Supreme Court is deemed to have decided that it always does in the case of "naturally competing railroads," it does not follow that it always does in other lines of trade and commerce. The fact that it does, must, we submit, be established in each case. The courts cannot make facts or, properly, adjudge facts without or contrary to evidence.

Take the two express carriers of Judge Lacombe's now famous opinion. If instead of each running his ramshackle wagon with his worn out horse, they combine their capital and energies and by so doing give better facilities at reasonable rates, will trade or commerce, as matter of fact, be thus restrained; will it not rather be promoted? Is the formation of a partnership between two persons engaged in the same business a hin-

drance to progress in trade or commerce? Has the development of trade and commerce, which has been so phenomenal during the last half century, been accomplished notwithstanding or because of the use of corporate organization to combine the labor and resources of many to take the place of the separate efforts of single individuals? Have we been working blindly all these years? In choosing combination through partnerships and corporations as the leading method in out efforts to develop trade and commerce, have we chosen a method which must necessarily restrain trade or commerce? Should we now face about and require that each man and each man's money shall work alone to the end that trade and commerce may be free from restraint and so may expand, develop and increase?

The history of the act shows a clear intent on the part of Congress not to condemn contracts and combinations in restraint of competition generally.

The proposal to deal with restraints upon competition was rejected in putting the bill in its final shape. Such proposal had been before the Senate for many months. The Sherman Bill (S. 1, in the Fifty-First Congress) introduced by Senator Sherman on December 4, 1889 (substantially the same as S. 3445, introduced by him in the Fiftieth Congress on August 14th, 1888), was directed primarily against "arrangements, contracts, agreements, trusts or combinations made with a view, or which tend, to prevent full and free competition."

(It was directed also against arrangements, etc., "to advance the cost to the consumer"). This bill was debated quite at length from February 27th to March 27th, 1890, as shown on pages 72 to 299 of "Bills and Debates in Congress relating to Trusts," prepared by direction of the Attorney-General in 1903. On March 27th, 1890, it was referred to the Judiciary Committee, because of questions as to validity, as to meaning and as to policy. Restraint of competition was the one primary subject of the bill as it was on March 27th, 1890, but as redrawn by the Judiciary Committee, and as it became law, it

made no mention of competition, but was directed, in the first section (the second relating to monopolizing) against contracts, combinations and conspiracies in restraint of trade or commerce. The Judiciary Committee, it is true, threw away all of the bill referred to it, except the enacting clause; but since restraint of competition was the primary object of attack in the bill as referred, so it was the conspicuous thing which the Committee rejected in redrawing it.

That the rejection of competition as the subject of enactment was intelligently intended and was not the result of inadvertence, is clear enough from the mere comparison of the bill in its two forms, before and after the Judiciary Committee dealt with it. But it becomes clearer still in the light of what immediately preceded the reference to that Committee. Once before a motion so to refer it had been made, but it had been voted down. On March 27th, 1890, it was made again with success immediately upon the close of a forcible speech by Senator Platt, of Connecticut, to be found on pages 295-298 of said compilation of "Bills and Debates in Congress relating to Trusts," and presumably because of his criticism of the bill as it then was. Senator Platt, among other things, said:

> "In other words, this bill proceeds upon the false assumption that all competition is beneficent to the country and that every advance of price is an injury to the country. That is the assumption upon which this bill proceeds. There never was a greater fallacy in the world. Competition, which this bill provides for as between any two persons, must be full and free. Unrestricted competition is brutal warfare and injurious to the whole country. The great corporations of this country, the great monopolies of this country are every one of them built upon the graves of weaker competitors that have been forced to death by remorseless competition. I am entirely sick of this idea that the lower the prices are the better for the country, and that any effort

to advance prices, no matter how low they may be, and that any arrangement between persons engaged in business to advance prices, no matter how low they may be, is a wrong and ought to be repressed and punished."

The Senate had had before it for months a bill directed against arrangements, contracts, &c., in restraint of competition. Through its Judiciary Committee it redrew the bill, leaving out all reference to competition and directing its prohibition against contracts, combinations and conspiracies in restraint of trade or commerce and against monopolizing; and this it did immediately after the suggestion of Senator Platt that in the interest of trade and commerce competition must sometimes be restrained, that a prohibition against contracts or combinations in restraint of competition would oftentimes operate to limit the growth of trade or commerce, to prevent its expansion and development. The title was changed so as to declare its purpose to be "to protect trade and commerce," and the prohibition was made to run, not against contracts or combinations in restraint of competition, but instead against contracts or combinations in restraint of trade or commerce. Clearly the proposal to condemn all contracts or combinations in restraint of competition was rejected by the Senate when it passed the bill of April 8th, 1890.

The subsequent history of the bill is worth consideration in this connection. Efforts were made in the House to put back the prohibition against contracts affecting competition, but they failed. The bill finally became law in the form in which the Senate passed it on April 8th, 1890. What the Senate rejected was also rejected by the House. In the House, on the proposal of Mr. Bland, an amendment was made by adding:

"Every contract or agreement entered into for the purpose of preventing competition in the sale or purchase of any commodity transported from one State or territory to be sold in another, or so con-

> tracted to be sold, or to prevent competition in the transportation of persons or property from one State or territory into another shall be deemed unlawful within the meaning of the Act * * * ."

When the bill came back to the Senate, it concurred in the House Amendment, with an amendment making it read as follows:

> "Every contract or agreement entered into for the purpose of preventing competition in the transportation of persons or property from one State or territory into another, so that the rates of such transportation may be raised above what is just and reasonable, shall be deemed unlawful within the meaning of this Act."

Thereafter a conference was had which recommended the adoption of the amendment in form as last shown, with an addition of no importance for the present purpose.

The report of the House conferees was accompanied by a statement of the majority of them as follows:

> "In the original bill, two things were declared illegal, namely, contracts in restraint of interstate trade or commerce, and the monopolization of such trade.
>
> "Its only object was the control of trusts, so-called, so far as such combinations in their relation to interstate trade are within reach of Federal legislation.
>
> "The House amendment extends the scope of the act to all agreements entered into for the purpose of preventing competition either in the purchase or sale of commodities, or in the transportation of persons or property within the jurisdiction of Congress.
>
> "It declares illegal any agreement for relief from the effects of competition in the two industries of transportation and merchandising, however excessive or destructive such competition may be.

"The amendment reported by the conferees is the Senate amendment with the added proviso that the powers of the States over the subjects embraced in the act shall not be impaired thereby.

"It strikes from the House amendment the clause relating to contracts for the purchase of merchandise, and modifies the transportation clause by making unlawful agreements which raise rates above what is just and reasonable."

The conference report was rejected, the House receded from its amendment, and the bill was finally passed by the House in form as originally passed by the Senate.

The proposal to interfere with contracts and combinations affecting competition, as such, having been turned down in the Senate, was brought up again in the House, and was finally turned down there. If it is to be taken up again and made effective, can this be done by judicial action?

A contract or combination in restraint of competition might or might not restrain trade or commerce. Such a contract or combination was condemned, if at all, not because it restrained competition, but because it restrained trade or commerce. If any contract or combination should be challenged under the bill as passed, the question would be: Does it as a matter of fact restrain trade or commerce? If this question were answered in the negative, the challenge must fail, regardless of the question: Does it in fact restrain competition?

That these two questions are not identical Mr. Justice Peckham substantially agreed, speaking for the court, in the Joint Traffic Association case. That they are not identical was clearly shown by Senator Platt in the speech referred to above. And is it not obvious to common sense? And yet they seem to have been treated as identical by the Circuit Judges in the Thomsen case. Finding a contract or combination involving elimination or restriction of competition, they pass immediately to the conclusion that it is in restraint of trade or commerce, and illegal under the act. Where in the language of the

act, either read by itself or in the light of its history, can justification be found for holding that to be "in restraint of trade or commerce," whereby trade and commerce are not restrained, but are, on the contrary, developed and increased?

Turn again to the last words of the statement in the Joint Traffic case, which is the only ultimate support for the proposition that restraint of competition is restraint of trade or commerce, "restrains instead of promoting trade and commerce." Promoting and restraining are here used as opposities. Can that which promotes trade or commerce be held to be in restraint of trade or commerce?

Can there be any doubt that the intention of the Act was as expressed in its title: To protect trade and commerce? "To protect trade and commerce against unlawful restraints and monopolies?" It looked to the development and increase of trade and commerce in the interests of the public, to its growth and expansion and the removal of obstacles to such growth and expansion. It seems almost like a trifling with a large purpose to treat the Act as if it meant to make illegal every effort for the development of trade or commerce, however well calculated to the end in view, which involved any elimination of competition. Say that Congress had in mind and assented to the general proposition that competition is the life of trade. May they not at the same time have realized that, in the interest of trade, competition must sometimes be eliminated? May they not have looked around and behind them and have seen that combination through partnerships, associations and corporations, necessarily involving elimination of comeptition among the members, has been and was and always would be essential to the creation of competition adequate for the full development of trade and commerce? That here and there competition might be eliminated, was of no consequence; the purpose was to protect trade or commerce, and Congress prohibited only contracts and combinations by which trade or commerce would be restrained.

It is submitted that before any contract or combination can be condemned under the Act, it must appear that thereby trade or commerce was in fact restrained. The fact may perhaps be found by presumption based on judicial knowledge; but in some way the fact must appear. If it be found that thereby trade or commerce was promoted, such finding is a denial that it was restrained. But if it is matter of uncertainty whether trade or commerce was thereby restained or promoted, the burden of such uncertainty must turn the scale against the Government.

* * * * * * *

Mr. Bland, when he offered the House amendment, quoted on page 12, *ante*, speaking of the bill as it became law, said:—

> "I was somewhat struck, Mr. Speaker, with the frankness of my friend from Texas (Mr. Culberson) in his explanation of this bill. If the country is advised up to this very time as to any particular kind of contract or agreement that is covered by the bill, the gentlemen who have reported it and who have advocated it upon this floor have not designated that particular contract."

The frankness of Mr. Culberson, to which he referred, was that shown by him when, reporting the bill from the Judiciary Committee of the House, he said:—

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the courts have construed and interpreted this provision."

And again:—

> "I wish to be understood, Mr. Speaker, as having stated in the outset that I do not know, nor can any man know, just what contracts will be embraced by this section of the bill until the courts determine."

Mr. Taft, speaking at Bath, Maine, in 1906, said:—

> "It would seem as if Congress itself knew that the evil existed, but had a most indefinite idea of how it was to be described, and the matter was apparently turned over to the courts as cases arose and decisions were invoked, to work out the exact character of the offences denounced."

Since Congress had no clear intention in passing this Act and the courts are still engaged in "working out the character of the offences denounced," the position taken in this brief cannot fairly be attacked by a challenge to those who hold it to come out and tell what the Act does mean. That still remains for the courts to do. We insist that it is clear that it has not the meaning given to it by the Circuit Court in the Thomsen case. If this is clear, it matters not how much or how little of meaning may be left to it.

But will there not be left enough of meaning to reach the evil sought to be repressed, to fit the purpose of Congress—"to protect trade and commerce," or in other words, take away hindrances to its promotion and development? Contracts and combinations which really restrain trade or commerce are still condemned, and it will still be for the courts, as to any contract or combination which is challenged, to decide whether trade or commerce is thereby restrained or promoted. They cannot reach an answer simply through the test question: Does it eliminate or limit competition in any way? But on the other hand, if the contract or combination involves a restriction of competition, they are not barred from finding that through such restriction of competition, trade or commerce is actually retrained. It is submitted simply that the test applied by the court in the Thomsen case was a false test and should be rejected.

If the law were clear, as held by that court, this court, of course, would not be deterred from so declaring by

apprehension as to the results to follow. But such results may properly be considered in determining the meaning of the act. It is pertinent to ask whether the law can reasonably be given a meaning which will bring about such results. And furthermore, if the functions of the courts in "working out the character of the offences denounced" are largely legislative—as we respectfully suggest that they are—then surely the results to follow from any declaration of the meaning of the Act are proper subjects for consideration.

* * * * * * * * * *

Combination is essential to adequate competition. If every combination in the land should be dissolved and its assets sold or distributed, would there not be many individuals each having overwhelming strength in some line of business? Who could compete with them, if each man and each man's money must work alone, if two or more may not combine in order to get together strength enough to meet them on fairly equal terms? Adequate competition in almost every field is impossible without combination. To forbid combination is to prevent such competition. It is to create monopoly.

It is hardly necessary to suggest the confusion and disturbance which would come, if the law as declared by the Thomsen case were to be generally enforced. But the practical impossibility of bringing about the dissolution of many existing combinations, and the long time required to effect the dissolution of those which can be dissolved, should not be overlooked. While such combinations still live, the effect of a decision that combinations can no longer be formed will prevent effective competition with existing combinations, and give them substantial monopoly in their several lines of business.

To declare the law as not forbidding every contract or combination which eliminates or limits competition, is to permit contracts or combinations essential to the promotion of trade and commerce, leaving contracts and combinations which really restrain trade or commerce still under condemnation.

Putting, then, the test question: "Does the contract unduly restrain interstate or foreign commerce?" what is the case against Reading Company in respect of its acquisition of the majority of the shares of the Central Railroad Company of New Jersey?

We do not find here any "competition between two roads engaged in interstate traffic" from the same territory or region, nor in competition for like kinds of traffic, save for the natural competition of shippers of like kinds of traffic in common markets, precisely as though all the shippers were located on the same line and not on both.

We do not find the destruction of "every motive for competition between the two roads;" on the contrary, we do find remaining on both lines every motive that ever existed to encourage, promote, foster and facilitate the development of all kinds of intercourse-commerce-trade, whether tributary solely to each severally or to the various joint through routes which these systems form.

We find that the proximity of the lines of the Delaware, Lackawanna & Western, the New York, Ontario & Western, the Erie, and the Delaware & Hudson to the lines of the Jersey Central, and that of the Pennsylvania's line to the line of the Philadelphia & Reading, would leave any competitive conditions in the coal carrying business very slightly affected by the elimination of any competition between the Jersey Central and the Philadelphia & Reading.

We find here a holding company holding the major portion of the shares of two carrying companies, without the slightest power to limit, control or even direct the economic or competitive forces of either, save only at the sacrifice of its own interests, in one case or other—it cannot influence or control the transportation rates of either, for the rates of both are solely influenced and controlled by competitive conditions arising from the juxtaposition of each severally with other transportation lines, that is to say the traffic, especially the anthra-

cite traffic, originating on the lines lying to the northward and northeastward (the D. L. & W., N. Y. S. & W., the Ontario & Western, the Erie and the Delaware & Hudson, on the one hand, to say nothing of that originating on the lines of the Lehigh Valley, which may be said to lie between these two), demands and compels such rates and facilities from their carriers to reach the competitive markets as positively to compel the Jersey Central to provide for its shippers at least equivalent rates and facilities.

And so again, as to the Reading Railway, the rates and facilities accorded by the Pennsylvania Railroad to its shippers, especially to shippers of anthracite coal from the collieries reached by it, to say nothing again of the necessary extension of equivalent rates and facilities to its shippers by the Lehigh Valley, naturally force and compel the Reading Railway Company to provide for its shippers, especially of anthracite, located on its lines and served by it, at least equivalent rates and facilities to enable them to compete on fair terms, in common markets.

Here then, wholly unlike the situation and relation of the Northern Pacific and Great Northern Railroads, when under control of the Northern Securities Company, we find Reading Company entirely powerless to produce any, the slightest, inimical result upon trade or commerce whether state or interstate—it finds itself entirely "cribbed, cabined and confined," by irresistible, external economic forces, to but one line of action, beneficial to trade; and at the same time advancing its own interests; that is, to promote, enlarge, develop and extend the traffic and sources of traffic on both lines to the utmost extent and limit of its power.

The result has been in accordance with and in obedience to the natural and necessary force of economic law. The trade and commerce on both lines, instead of being in any way limited and restrained, have been greatly facilitated and enlarged; the local traffic tributary to each—not excepting anthracite—has vastly increased,

while the stream of traffic carried over the joint through routes has swollen to enormous volumes. It is idle to argue in the face of facts that the result should be otherwise.

We can find no parallel in this situation to warrant the application of the judgment of Supreme Court in the Northern Securities case on the facts there, as having the slightest weight in the case at bar.

Nor is the case of Stockton, Attorney General, *vs.* Philadelphia and Reading, at all in point. The facts as shown here were not before the chancellor, whose whole opinion was based upon a misconception of the facts arising from *ex parte* affidavits as the record shows. Here we show by the evidence that the controlling facts assumed in the opinion and upon which it proceeds, do not now exist in any degree, and we have a right, we think, to urge that a final hearing would have shown the same facts there. There were also wholly different issues in the Stockton case, which do not apply to the case here. There was a lease there, which under the facts before him the learned chancellor held to be contrary to the laws of New Jersey.

The mere incident that the Central Railroad Company of New Jersey owns the major portion of the shares of the Lehigh and Wilkes-Barre Coal Company does not bring the Act of July, 1890, to bear upon Reading Company's purchase of an interest in Jersey Central shares, because:—

1. We have seen that this ownership of those shares does not tend either directly or indirectly to restrain commerce and trade among the several States, but that, instead, the natural and necessary tendency is to increase, promote, and facilitate it.

2. It does not tend to limit or restrain either the Philadelphia and Reading Coal and Iron Company or the Lehigh and Wilkes-Barre Coal Company in their activities in trade, nor has it done so. On the contrary it is shown to be to the direct interest and advantage of

Reading Company that each should maintain and continue its activities to the utmost extent, in the production, shipment and sale of their product, in all markets, state and interstate.

3. Each of these producing companies preserves its individuality in the ownership, control and operation of its own property, under its own board of directors, having a different personnel, and each is separately and severally amenable to the laws of its creation, as well as to the laws of the United States in respect of such matters as come within the legitimate regulative power of the Congress.

4. As to their several ownership of lands, their operation of mines and their manufactures in the preparation of coal for the markets, none of these things are commerce at all, much less interstate commerce, and they are all entirely beyond the regulative power of Congress whether in respect of restraint of trade or in respect of monopolies.

5. The regulative power of Congress is confined to that portion of production from the mines which has been, or is to be, put in transit in interstate commerce, and in neither case does the evidence show any illegal or other restraint or monopoly, or attempted monoply.

6. How can there be a monopoly of the subjects of interstate trade, when the production is in the hands of several hundreds of separate and independent owners and operators?

7. Confining our attention, however, to the production of the dozen or more of the larger concerns, how can there be a monopoly when each maintains its own separate and independent ownership and control of its own operations and shipments? And finally,

8. Even supposing that the several and separate natural and legislative monopolies resulting and to result from the acquisition of large bodies of lands, lawful in the State, should become offensive to federal notions of policy. Can the Congress of the United States interfere with them, save by forbidding their products or output from entering into interstate commerce?

It has not been shown that this acquisition has produced, or that it can reasonably be expected to produce, any of the consequences that are within the prohibitions of the Anti-Trust Law.

CHAS. HEEBNER,
Of Counsel.

OCTOBER, 1911

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No. 198.

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES,
Appellant,
vs.
THE READING COMPANY ET AL.,
Appellees.

SEPARATE BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLEE.

JAMES H. TORREY,
Solicitor for The Delaware and Hudson Company.

WILLIAM S. OPDYKE,
JAMES H. TORREY,
Of Counsel.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of United States.

UNITED STATES OF AMERICA,
Appellant,

vs.

READING COMPANY, PHILADELPHIA AND READING RAILWAY COMPANY, LEHIGH VALLEY RAILROAD COMPANY, DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, CENTRAL RAILROAD COMPANY OF NEW JERSEY, ERIE RAILROAD COMPANY, NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,
(Railroad Co's. original def'ts.)

PHILADELPHIA AND READING COAL AND IRON COMPANY, LEHIGH VALLEY COAL COMPANY, LEHIGH AND WILKES-BARRE COAL COMPANY, PENNSYLVANIA COAL COMPANY, HILLSIDE COAL AND IRON COMPANY, NEW YORK, SUSQUEHANNA AND WESTERN COAL COMPANY, TEMPLE IRON COMPANY,
(Coal Co's. original def'ts.)

THE DELAWARE AND HUDSON COMPANY, ET AL.,
(Def'ts. added by amendment.)

SEPARATE BRIEF FOR THE DEFENDANT-APPELLEE THE DELAWARE AND HUDSON COMPANY.

Statement.

The Delaware and Hudson Company, with others, was added as a defendant in this suit by amendment of the Gov-

ernment's Petition made in October, 1907, upon the coming in of the Answers of the original defendants named in the above caption (Record, pp. 37–40). The final decree of the Circuit Court for the Eastern District of Pennsylvania, from which the Government appeals, dismisses the Government's Petition, so far as The Delaware and Hudson Company is concerned (I., Record, p. 468; Paragraph Seventh of Decree). The Government assigns as error that the Circuit Court dismissed the petition "as to any party named as defendant" (I., Record, p. 470, First Assignment of Error). This separate brief is respectfully submitted in behalf of The Delaware and Hudson Company, for the purpose of showing that, upon the evidence in the suit, the decree of the Circuit Court, so far as it dismissed the Government's Petition against this defendant, was correct and should be affirmed, entirely irrespective of what disposition may be made of the cases of any of the other defendants.

Although The Delaware and Hudson Company is an owner of anthracite coal mines and also operates a railroad from the anthracite coal region of Pennsylvania into the State of New York, its railroad does not extend to the vicinity of New York City, but runs to Albany and the northern part of the State of New York, and it carries no coal destined to New York Harbor. It therefore does not *buy* any coal under the so-called "65 per cent. contracts" mentioned in Paragraph VII. *(a)* of the Government's Petition, and is not charged with so doing. It was, however, at the time the Petition herein was filed, a *seller* of a portion of its coal in Pennsylvania under one of said contracts to the Hillside Coal and Iron Company, one of the original defendants herein, and the Government's Amended Petition added The Delaware and Hudson Company and others as defendants, upon the allegation that it and they were "coal operators who are the contracting parties with the "defendant carriers or the defendant coal companies, as the "case may be, in the contracts described in paragraph VII. *(a)*

" of the original petition and prayed to be adjudged unlawful " as in violation of the Act of July 2d, 1890 " (I., Record, pp. 38, 39).

The only prayer of the Petition as amended, which can be taken as asking any relief against The Delaware and Hudson Company, is the following:

> " SECOND. *(a)* That the contracts described in paragraph VII*a*. hereof * * * are contracts in restraint of trade and commerce among the several States and constitute a part of the aforesaid combination or conspiracy * * * to restrain such trade and commerce and monopolize a part thereof, and are therefore illegal and void * * * ; and
>
> *(b)* That the said contracts be delivered up to be cancelled and that the defendants, their agents and servants and all persons acting or assuming to act under their authority, be forever enjoined from further executing or carrying into effect any of the provisions of the said contracts or from making or entering into any contracts of like character or effect hereafter " (I., Record, p. 25).

The only contracts of the character referred to in the above prayer, shown by the record ever to have been made by The Delaware and Hudson Company, are

> 1. A contract made by The Delaware and Hudson Company with the original defendant Hillside Coal and Iron Company, dated June 30, 1902, which is annexed to the separate answer of The Delaware and Hudson Company. By the terms of this contract The Delaware and Hudson Company agreed to sell and deliver in Pennsylvania to the Hillside Company, at least 800,000 tons of anthracite coal in each year for a period of five

years beginning July 1, 1902, and terminating July 1, 1907. The prices were to be, for sizes above pea, sixty-five per cent. of the general average free on board prices of the said sizes at tide-water in New York harbor, and smaller percentages for the smaller sizes. This contract was extended in April, 1907, until April 1, 1908, a date only four months after the answer of The Delaware and Hudson Company was filed herein (I., Record, pp. 152–160).

2. A contract made April 28, 1908, between The Delaware and Hudson Company and the Hillside Coal and Iron Company. Under this contract the Delaware and Hudson Company agreed to sell to the Hillside Coal and Iron Company 500,000 tons of anthracite coal of the average product of its mines excluding sizes below buckwheat No. 1, to be delivered in as near as may be equal monthly instalments; prices to be based on Ruley's averages; coal to be delivered to the Erie Railroad Company at Honesdale, Pa. (II., Record, p. 138). Under this contract the Hillside Company paid to The Delaware and Hudson Company sixty-five per cent. of the tidewater prices for prepared sizes (II., Record, p. 158).

No part of the Petition or the amendment thereto charges that The Delaware and Hudson Company was a party to the alleged combination to control, regulate, restrain or monopolize either the production or transportation of anthracite coal. It is before the Court, therefore, merely in the character of a so-called "independent operator" who as seller joined in contracts to sell to the defendant, Hillside Coal and Iron Company, limited annual amounts of anthracite coal, presumably produced by it, deliverable in Pennsylvania, for which it was to receive as the price or compensation percentages of the general average free on board prices at tidewater at or near

New York. The Company's last contract of this character with the Hillside Coal and Iron Company expired in April, 1909.

The separate answer of The Delaware and Hudson Company denies (I., Record, pp. 152, 153), that at any time there was any division between it, either as a coal company or as a carrier, and any other person or corporation of any percentages of the total tonnage of anthracite coal transported from the anthracite mines, and states that it is an utter stranger to all the matters and things set forth in the plaintiff's petition except that it admits that it made the before-mentioned agreements with the Hillside Coal and Iron Company, and avers that the same were *bona fide* agreements for the sale of coal at its breakers in Pennsylvania; that they were not entered into by it either in pursuance or in furtherance of any combination or conspiracy of any kind or character whatsoever; that they were entered into by it without any plan, purpose or intent to restrain trade or commerce or to stifle competition or to fix or maintain prices or to create or to aid in creating a monopoly in the sale of anthracite coal; but that they were entered into by it solely because in the exercise of its business judgment it believed and it still believes that considering the various vicissitudes and risks and uncertainties connected with the marketing of anthracite coal it was to its best interest and advantage to make said agreements for the sale of a portion of the coal produced by it.

Upon this Statement The Delaware and Hudson Company contends that nothing in the allegations of the Petition nor any of the facts shown in the Record afford the slightest support for any contention on the part of the United States either,

I. *That it was a party to the alleged combination between the original defendants herein, either for the restraint of trade, or the establishment of a monopoly*

in the production, sale or transportation of anthracite coal.

II. *That the contracts made by it for the sale of anthracite coal in limited amounts and in limited periods to the Hillside Coal and Iron Company, violated any law of the United States.*

III. *That the United States is entitled to ask for the entry of any decree, by way of injunction or otherwise, against The Delaware and Hudson Company.*

POINTS OF ARGUMENT.

I.

The Delaware and Hudson Company has never been a party to any combination for the establishment of a monopoly or for the restraint of interstate commerce, in respect of the production, sale or transportation of anthracite coal.

Although there are general statements in the Petition that the alleged combination was made for the purpose of establishing a monopoly of the production of anthracite coal and its transportation from Pennsylvania to other States, both the proofs and the Government's Brief appear to be directed solely against an alleged combination in respect to anthracite coal transported to tidewater at New York harbor.

The Delaware and Hudson Company has never transported anthracite coal from Pennsylvania to tidewater at New York harbor. Its former canal reached Kingston upon the Hudson River, and its present railroad lines run from Pennsylvania to the Hudson River at Albany and Troy and extend into New England and to the Canadian boundary

line. Prior to 1902 it shipped to its own sale agents a certain portion of the anthracite coal produced by it, by the railroads of the Erie Railroad Company and of the New York, Susquehanna and Western Railroad Company, to New York harbor. It was evidently because this defendant did not own or operate any line of railroad from the anthracite region to tidewater, that it was not made one of the original defendants in the pending proceeding; and when it was made an additional defendant, it was described merely as being a coal operator who had contracted with the original defendants for the sale of coal.

The United States has offered certain evidence, not relevant to the allegations of its Petition except perhaps as matter of inducement, in respect to alleged agreements to restrain competition made in 1876, 1884 to 1887, and 1896 between the original railroad corporation defendants, to which agreements, or some of them, it claims that The Delaware and Hudson Company was a party. It will suffice to say that no proof whatever was made of any action taken by any of those claimed to be parties to such alleged agreements, to carry the same into effect. The proof was clearly to the contrary. Notwithstanding such alleged agreements each of the coal carrier corporations continued to compete with each of the other such corporations at all times and in all respects.

It is true that the different coal carrier corporations early arranged that statistics of the production, transportation and sale of anthracite coal at tidewater, should be gathered for the information of each of such carriers. This was a wise, natural, wholesome and valid proceeding, for careful business men in the conduct of their business, and was of service to the public as well.

While this collection and publication of statistical information as to the consumption of anthracite coal would naturally tend to a conservation of the mine deposits of such

coal, it could have no tendency towards restraint of commerce in such coal or towards the establishment of a monopoly in the production, sale or transportation thereof. Its natural tendency on the one hand would be to dissuade the various producers of coal from engaging in a destructive and unprofitable exhaustion of their mines, and on the other hand to hasten production when it appeared that the market supply was becoming insufficient;—all wholesome and beneficial results.

II.

The contracts made by The Delaware and Hudson Company with the Hillside Coal and Iron Company for the sale of anthracite coal in limited amounts and in limited periods to the Hillside Coal and Iron Company, violated no law of the United States.

The so-called 65 per cent. contracts attacked in the Petition, VII. *(a)*, were contracts by parties producing anthracite coal, to sell to one of the railroad or coal corporations constituting the original defendants, *all of the anthracite coal thereafter produced by them as called for by such carrier or subsidiary coal company*, at prices, for prepared sizes, equal to 65 per cent. of the general average free on board prices of like sizes prevailing at tidewater near New York, and at proportionate smaller percentages for smaller sizes. The contracts made by this defendant with the defendant Hillside Coal and Iron Company *were not for all the production of the seller's mines, and were not for the continuance of such sales during the life of its mines.* The first contract was for 800,000 tons of coal annually and was to run only for five years from July 1,

1902, *and* was extended in 1907 until April 1, 1908. The second contract was for only 500,000 tons.

This defendant's railroads ran to the Northern part of New York State and by its connections reached New England and Canada, and thus reached important markets for the sale of the coal produced from its mines. Prior to 1902 its practice was to ship for sale in New York harbor any surplus of coal not disposed of in the other markets just named, thus necessitating the maintenance of a Selling Agency at New York. Its contracts since 1902 with the Hillside Coal and Iron Company enabled it to abandon its New York Selling Agency, although in a way which maintained the identity of its coal in that market, and still to dispose of all its surplus product profitably to itself.

These contracts with the Hillside Coal and Iron Company were contracts for the sale of coal in the State of Pennsylvania, and all deliveries under such contracts were made in the State of Pennsylvania. They were therefore purely *intrastate* contracts, both made and performed within the State of Pennsylvania. They did not directly relate in any way to interstate commerce.

Coe v. Errol, 116 U. S., 517.
The Daniel Ball, 10 Wall., 557, *565*.
Kidd v. Pearson, 128 U. S., 1, *24*.
U. S. v. Knight, 156 U. S., 1, *13*.
Hopkins v. U. S., 171 U. S., 578, *592, 593, 598, 603*.
Anderson v. U. S., 171 U. S., 604.
Addyston Pipe Case, 175 U. S., 211, *247*.
Field v. Barber Asphalt Co., 194 U. S., 618, *623*.
Bigelow v. Calumet & Hecla Co., 167 Fed. Rep., 721.

III.

The United States is not entitled to ask for the entry of any decree, by way of injunction or otherwise, against The Delware and Hudscn Company.

When the United States joined The Delaware and Hudson Company as an additional defendant, it assumed the burden of proving the allegation of its Petition charging that while the so-called 65 per cent. contracts were cast in the form of contracts of sale, in reality they were mere devices to stifle competition and create a monopoly in the sale of anthracite coal.

This charge may be taken as meaning that such contracts were such devices on the part of both the buyer and seller joining therein. Every such allegation has been specifically denied by the separate Answer of The Delaware and Hudson Company, such denial being accompanied by the positive averment that its contract with the Hillside Coal and Iron Company was entered into by it solely because it believed that it was to its best interest and advantage to make the said agreement for a sale of a portion of its coal. The United States has failed to make any proof that this defendant, in making its said contract with the Hillside Company, was a party to any scheme or device to stifle competition or to create a monopoly; and has thus failed to sustain its burden of proof.

The present proceeding is under a statute of a penal character requiring the strictest proof.

Northern Securities Case, 193 U. S., 197, *401.*

The absolute freedom of this defendant to make contracts for a sale of a portion, or even of all, its production of anthra-

cite coal to anyone or in any form it sees fit, is one which cannot be taken away from it by any statute of a State or of the United States.

Certainly in the absence of any proof that such sale was upon the part of The Delaware and Hudson Company a portion of an illegal combination to which it was itself intentionally a party, the Company is entitled to enforce such contract against the other party thereto, and that right cannot be taken away from it without its consent, no question of police power being involved.

Tracy v. Talmage, 14 N. Y., 162, *167*.
Ganson v. Tifft, 71 N. Y., 48, *57*.
Graves v. Johnson, 179 Mass., 53.
National Distilling Co. v. Cream City Importing Co., 86 Wis., 356.
Metcalf v. American School Furniture Co., 122 Fed. Rep., 115, *120*.
Carter-Crume Co. v. Peurrung, 86 Fed. Rep., 439, *442*.
Adams v. Coulliard, 102 Mass., 167.
Connolly v. Sewer Pipe Co., 184 U. S., 540.

This defendant's contracts with the defendant Hillside Coal and Iron Company, were merely ordinary commercial contracts of sale by a producer to a satisfactory purchaser. The sale had no connection with the alleged combination; the sale was not induced by the combination, or by any reason based upon the existence of such combination. A refusal to make the sale could have had no material effect upon the alleged combination or its success. It was not dependent upon the obtaining by any member of the alleged combination of similar sales from others, but an entirely independent transaction between the two parties thereto.

Such a contract cannot be declared void as to The Delaware and Hudson Company, nor its cancellation be decreed so long as it has any claims thereunder against the other

party thereto. Its right in the contract is vested and cannot be taken away from it without compensation.

Nor should The Delaware and Hudson Company be enjoined from making and performing future contracts for the sale of its coal in Pennsylvania to such persons and at such prices as it deems proper.

IV.

The decree appealed from should be affirmed so far as it dismisses the Petition against The Delaware and Hudson Company.

Respectfully submitted,

WILLIAM S. OPDYKE,

JAMES H. TORREY,

Counsel for the Delaware and Hudson Company.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1911. Nos. 477, 485, 504.

THE UNITED STATES OF AMERICA, Appellant,

v.

THE READING COMPANY, *et al.*, Appellees.

Petition of Delaware, Lackawanna and Western Railroad Company for a Modification of Decree.

To the Supreme Court:

The Delaware, Lackawanna and Western Railroad Company (hereinafter called Lackawanna Company) respectfully petitions the Court with reference to the decree to be entered herein, and alleges:

1. It is a duly incorporated Pennsylvania corporation and authorized under the laws of the State of Pennsylvania to own and hold anthracite coal lands in fee and to engage in the mining thereof. That the People's Coal Company and the George F. Lee Coal Company are duly incorporated Pennsylvania corporations likewise authorized under the laws of said State to own anthracite coal lands and engage in the mining of coal.

2. That on the 26th day of October, 1899, the said Lackawanna Company, being the lawful owner

of certain coal lands situated in Lackawanna County, Pa., known as the Oxford Mines, which it had so owned for many years theretofore, made an agreement with the said People's Coal Company whereby the said People's Coal Company were to mine the coal contained in said Oxford mines so owned by said Lackawanna Company, on a royalty basis of forty cents per ton, and after mining and preparing said coal for the market, were to sell the same to the said Lackawanna Company pursuant to the terms of a contract in the form of and substantially on the basis of the so-called 65 per cent. contract referred to in the opinion herein. That said agreement was in the form of two written contracts duly and contemporaneously executed on said day. That since the date of said contracts and pursuant to the terms thereof, the coal in said Oxford mines has been continuously mined by said People's Coal Company and purchased by said Lackawanna Company, and there still remains a large acreage of coal therein.

3. That on the first day of May, 1907, the said Lackawanna Company, being the lawful owner of certain coal lands situated in Lackawanna County, Pa., adjoining its so-called Avondale colliery, which it has so owned for many years theretofore, entered into a certain agreement in writing with the said George F. Lee Coal Company which was duly executed by both parties, whereby the said George F. Lee Coal Company agreed to mine and prepare for market all the coal contained in the land described therein, so owned by said Lackawanna Company, and to sell the same when so prepared to said Lackawanna Company on the basis of said 65 per cent. contract. That since the date of said contract and pursuant to the terms there-

of, said George F. Lee Coal Company has continuously mined said coal and sold the same to said Lackawanna Company, and there still remains a large acreage of coal so to be mined and sold in the future.

4. That neither of the agreements above stated although partly in the form of said 65 per cent. contracts were or are in any respect illegal nor were they entered into in violation of the provisions of the Act of July 2nd, 1890, known as the Sherman Anti-Trust Act, nor are they within the condemnation of the opinion of this Court herein, because the coal contracted with respect to therein was owned by said Lackawanna Company and not by any so-called independent interest, and said contracts were not made at the time or in the manner or for any of the purposes or with the intent referred to in the opinion herein. That if by the terms of the decree to be entered herein said contracts should be adjudged to be illegal, great injustice and injury would be inflicted on the parties hereto.

5. That the Lackawanna Company and the People's Coal Company and the George F. Lee Coal Company were parties defendant herein. That the facts above stated were duly alleged in the answers of the People's Coal Company and the George F. Lee Coal Company at pages 224-229, Volume 1 of the Record herein, and were explained in the testimony without dispute at pages 903, 911-914, Volume 5 of the Record. That in the opinion herein it is said by this Court: "The case will be remanded with direction to enter a decree cancelling each of these contracts, and for such proceedings as are in conformity with this opinion."

Wherefore, your petitioner respectfully prays that the decree to be entered herein shall provide that the Court below may except from the general decree cancelling each of these contracts, the aforesaid mentioned contracts, and any others, between the defendants the Lackawanna Company and the George F. Lee Coal Company and People's Coal Company, if it shall find because of the particular and distinguishing facts with respect thereto that they were not entered into in violation of the provisions of the Act of July 2nd, 1890, as construed in the opinion herein.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.
By W. H. Truesdale,
President.

State of New York,
County of New York, } ss.:
City of New York,

William H. Truesdale, being duly sworn, says: That he is the President of the Delaware, Lackawanna and Western Railroad Company, the foregoing petitioner that he has read and knows the contents of the foregoing petition, and that the same is true to the best of his knowledge, information and belief.

W. H. TRUESDALE.

Subscribed and sworn to before me this 17th day of January, 1913.

Notary Public,
New York County.

Office Supreme Court, U. S.
FILED.
JAN 27 1913
JAMES H. McKENNEY

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Appellant

vs.

THE READING COMPANY, *et al.*

No. 198
OCTOBER TERM
1912.

PETITION

OF

ELK HILL COAL AND IRON COMPANY

FRANK H. PLATT,
SOLICITOR FOR PETITIONER.

the County of Lackawanna, in said State, which lands adjoined lands of the Pennsylvania Coal Company, on which no mining operations had theretofore been carried on; that the same veins of coal in which the Elk Hill Company was mining extended through and under the lands of the Pennsylvania Company; the coal in the lands of the Elk Hill Company was nearly exhausted for first mining, and it was desired by both Companies that the mining operations of the Elk Hill Company should be extended to the lands of the Pennsylvania Company, so as to commence the development thereof, and that eventually the property and operation of the Elk Hill Company on its own lands and the lands of the Pennsylvania Company would be taken over by the Pennsylvania Company and utilized in the development of its remaining coal property; in pursuance thereof an agreement was entered into between said Companies, dated March 1, 1902, whereby the Pennsylvania Company granted to the Elk Hill Company the right to extend its operations in and under certain portions of the lands of the Pennsylvania Company described in said agreement, and to mine and remove therefrom 1,500,000 tons of coal of prepared sizes, together with such quantity of coal of smaller sizes as should be made naturally in the preparation of said amount of larger sizes, the Elk Hill Company to mine and remove at least 50,000 tons of prepared sizes during each year after the first day of April, 1902, and to pay for all coal so mined the royalties fixed in and by said agreement, and if said amount of coal could not be mined and removed from the land in said lease described, the Pennsylvania Company would permit the deficiency to be taken from its other lands equally convenient for operation. It was further provided that whenever the Elk Hill Company shall have taken out said quantity of coal, the Pennsylvania Company shall take over, and the Elk Hill Company shall convey to it, all its said lands and the improvements thereon, the Pennsylvania Company paying therefor the value as of that time of said lands and the improvements thereon. It was further provided that the Elk Hill Company should sell to the Pennsylvania Company one-half of the coal so mined from the lands of the Pennsylvania Company and pre-

pared by the Elk Hill Company only if the Pennsylvania Company provided cars to receive the same at the breaker of the Elk Hill Company as and where the coal should be prepared; that the prices to be paid by the Pennsylvania Company to the Elk Hill Company for said one-half of the production were the prices then prevailing, to wit: the prices known as the sixty-five per cent. contract prices, but that the terms of the agreement for such sale contained no other provisions embodied in the sixty-five per cent. contracts which fell within the condemnation of this Court in its opinion, except in regard to the preparation of the coal and its inspection. That immediately after the making of said agreement, the Elk Hill Company extended its operation into the lands of the Pennsylvania Company and has mined and removed more than one-half of the stipulated quantity of coal, and has sold and delivered one-half of the daily output to the Pennsylvania Company whenever that Company furnished cars to receive the same, but that the Pennsylvania Company has frequently failed to furnish cars for or to take such one-half of the product under said agreement.

THIRD.—That neither the grant of the right to mine said coal, nor the contract for the sale back to the owner thereof of one-half the production, are in any respect illegal, nor were the same made and entered into for the purpose, or under the terms and conditions of the so-called sixty-five per cent. contracts, which fell within the condemnation of the Court in its opinion, as will appear from the said agreement or lease, which is attached to the answer of the Elk Hill Company filed in this case and found in the Record volume 1, page 163 (*et seq.*)

FOURTH.—The opinion of this Court, referring to the decree of the Court below as to contracts, is as follows:

> "It is reversed as to the sixty-five per cent. contracts, and the case will be remanded with direction to enter a decree cancelling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion."

That if the mandate of this Court should go to the Court below in the terms as cited above without any qualification, and the Court should feel constrained thereunder to cancel every contract which provided for a sale of coal at a price of sixty-five per cent. of the market prices on prepared sizes, irrespective of the fact that such contract was not of the character nor contained the elements nor was made for the purposes which were condemned in the opinion of this Court, all the rights of the Elk Hill Company to mine and remove coal from the lands of the Pennsylvania Company, under the agreement or lease hereinbefore recited, might thereby be terminated, and the obligation of the Pennsylvania Company to take over and pay for the property of the Elk Hill Company would be annulled, and the Elk Hill Company would suffer great and irreparable damage thereby, though innocent of any wrong doing.

WHEREFORE your petitioner, the Elk Hill Coal and Iron Company, respectfully prays that the mandate of this Court and the decree to be entered herein shall provide that the Court below may except from any general decree cancelling the so-called sixty-five per cent. contracts, the contract or agreement and lease heretofore mentioned between your petitioner and the Pennsylvania Coal Company, if it shall find that such contract and agreement and lease is not within the condemnation of the opinion of this Court, as above recited, and is not in violation of the provisions of the Act of July 2d, 1890, as construed in said opinion.

ELK HILL COAL AND IRON COMPANY,

By R. L. Hallard

Secretary.

FRANK H. PLATT,

Solicitor for Petitioner.

Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *Appellant,* vs. THE READING COMPANY, et al. *Appellees.*	No. 198, October Term, 1912.

TO THE SUPREME COURT OF THE UNITED STATES:

The Hillside Coal and Iron Company, a mining company of the State of Pennsylvania (hereinafter called the "Hillside Company") respectfully petitions the Court with reference to the decree to be entered herein and alleges:

(1) That it is a duly incorporated Pennsylvania Corporation and authorized under the Laws of the State of Pennsylvania to own, hold and lease anthracite coal lands and to engage in the mining and sale of coal. That the Lackawanna Coal Company Limited is a limited co-partnership association not incorporated but duly authorized to do business as a limited co-partnership association under the laws of the State of Pennsylvania, and as such it has the power to own, hold and lease anthracite coal lands and to engage in the mining and sale of coal therefrom.

(2) That on the 24th day of May, 1902, said Hillside Company, then being and long having been the lawful owner of certain coal lands situated in Lackawanna County in the State of Pennsylvania, did enter into an agreement of lease wherein said lands were duly leased to the lessee thereof and its successors and assigns, wherein and whereby said lessee and its successors and assigns were granted the right to mine all the merchantable coal in said lands of said Hillside Company which lands were duly described in said lease by metes and bounds, as containing 630 acres of the London and Woodbridge

tracts more or less; the lessee in said lease undertaking for itself, its successors and assigns, that it would mine and remove all merchantable coal from said premises saving only necessary pillars and supports; and said lessor also undertaking to take at the mine at least 60,000 tons of coal of 2,240 pounds each above the size of pea coal each and every year during the term of the lease, and to pay for all coal so delivered on the basis of the so-called 65 per cent. contract; the lessee, or the successors and assigns of the lessee undertaking in turn to deliver all of such coal to the lessor, from whose lands the same was to be mined, in return for which the lessee was to pay the lessor all taxes and assessments upon the lands so leased and royalties ranging from forty cents per ton on prepared sizes to twenty cents per ton on pea coal, ten cents per ton on buckwheat coal and five cents per ton on all smaller sizes; that said lessee thereafter duly assigned said agreement of lease to the Lackawanna Coal Company Limited, which assumed the obligations thereof; that said lessor delivered possession of said premises to said Lackawanna Coal Company Limited, under such lease and said Lackawanna Coal Company Limited has since been and now is mining coal from said lands under such lease, delivering the coal so mined to the Hillside Company, paying the Hillside Company the royalties thereon and in turn the Hillside Company paying said Lackawanna Company Limited the price agreed therefor; that there still remains in the said leased premises a large quantity of coal to be mined under the provisions of said lease and to be delivered to the Hillside Company in accordance with the above recited contract of lease. That October 21, 1903, a so-called 65 per cent. contract was entered into between said Hillside Company and said Lackawanna Company, Limited, to carry out the terms of said lease.

(3) That neither said agreement of lease containing royalty provisions and provisions for the sale of the coal to the lessor, nor the assignment thereof, nor said 65 per cent. contract supplementary thereto, are in any

respect illegal, nor were either of them entered into in violation of the provisions of the Act of July 2, 1890, known as the Sherman Anti-Trust Act, nor are either of them within the condemnation of the opinion of this Court herein, because the coal contracted about was owned by said Hillside Company and said contracts were made in good faith for the purposes therein stated and were not made with the intent to violate said Sherman Anti-Trust Act; and were not made in the manner or for any of the purposes or with the intent referred to in the opinion herein.

That in the opinion herein it is said by this court that as the result of negotiations between the independents and the subsidiary coal companies of the railroad companies a form of contract and a price was mutually agreed upon, being the form of the 65% contracts, which were thereafter entered into as the short term agreements theretofore made expired. It is said further "the contracts to be made would be not only for the life of the mines being operated at the date of the sale but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tidewater would be removed forthwith." That it appears by the facts recited in this petition that this particular contract of May 24, 1902, and October 21, 1903, was in no sense within the class of contracts mentioned in the opinion of this court, did not take the place of a short term contract, and did not tie up to any coal company controlled by any railroad, any coal theretofore free and independent. Further, this particular contract was dissimilar from the so-called 65 per cent. contracts adjudged illegal in the opinion of this court in that it did not purport to cover coal that might thereafter be acquired by the seller but was confined simply to the coal that might be mined from the leased lands, and referred to none other. That if the terms of the decree to be entered herein should be such as to apparently condemn such lease, assignment or supplementary contract or any

part thereof, great injustice and injury would be done to the parties thereto.

(4) That said Hillside Company and said Lackawanna Coal Company, Limited, under the name of the Lackawanna Coal Company, are each parties defendant herein, and the opinion of this court concludes with the statement that "the case will be remanded with direction to enter a decree cancelling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion"; that by reason of such language appearing in the opinion the court below may misapprehend the same or may apply such direction to said lease and the assignment thereof. That this contract is the only one your petitioner seeks to have excepted from the many named in its answer (R. 1, p. 119); and it is informed and believes that of the large number of so-called 65 per cent. contracts of other parties involved in this case very few present any grounds for such exception.

WHEREFORE, your petitioner respectfully prays that the decree to be entered herein shall provide that the court below may except from the general decree cancelling the 65 per cent. contracts, the aforesaid contract between said Hillside Company and the Lackawanna Coal Company, Limited, if it shall find that such contract was not within the condemnation of the opinion of this court herein and was not in violation of the provisions of the Act of July 2nd, 1890, as construed in such opinion.

HILLSIDE COAL AND IRON COMPANY.

By David Bosman
Secretary

Adelbert Moot
Solicitor.

STATE OF NEW YORK,
City and County of New York. } ss.:

David Bosman being duly sworn, says that he is an officer, to wit: Secretary of the Hillside Coal and Iron Company; that he has read the foregoing petition by him subscribed, and that the statements made by him therein are true, except as to such matters as are stated on information and belief, and as to those he believes them to be true.

David Bosman

Subscribed and sworn to before me this 17th day of January, 1913.

A. C. Travis

(Seal)

Notary Public No. 75 Kings County,
Certificate filed in New York County, No. 12,
My Commission expires March 30, 1913.

Office Supreme Court, U. S.
FILED.
JAN 20 1913
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE READING COMPANY ET AL.

No. 198 of October Term, 1912.

PETITION OF PENNSYLVANIA COAL COMPANY.

GEO. F. BROWNELL,
Solicitor.

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant, *vs.* THE READING COMPANY *et al.*, Appellees.	No. 198, October Term, 1912.

TO THE SUPREME COURT OF THE UNITED STATES:

Pennsylvania Coal Company respectfully petitions the Court with reference to the decree to be entered in the above-entitled case and alleges:

First.—That it is a duly incorporated Pennsylvania corporation, authorized by the laws of that State and by its charter to own, hold and lease anthracite coal lands and to engage in the mining and sale of anthracite coal. That The Elk Hill Coal and Iron Company is a corporation duly incorporated under the laws of the State of Pennsylvania, having the right under its charter likewise to own, hold and lease anthracite coal lands in said State, and to engage in the business of mining and selling anthracite coal.

Second.—That on the first day of March, 1902, said Pennsylvania Coal Company theretofore for many years

the owner in fee of certain coal lands situated in the County of Lackawanna in said State of Pennsylvania, entered into a contract known as a coal lease to and with The Elk Hill Coal and Iron Company, granting and leasing to the said The Elk Hill Coal and Iron Company the lands referred to therein, 1,500,000 tons of coal of prepared sizes, and such further amount of pea coal and smaller sizes as might be made in this course of mining and preparing the aforesaid amount of prepared sizes, and in and by the second article of said coal lease The Elk Hill Coal and Iron Company undertook and agreed to sell and deliver to the Pennsylvania Coal Company on board cars at the breaker at which the said coal was mined by the lessee from the said lands of the Pennsylvania Coal Company, one-half of all the coal thus mined and prepared in said breaker for market, under such terms and agreements as to payment therefor and preparation of the coal as are contained in what is known in this case as the 65% contract (the said coal lease and contract for the sale of the coal mined from the lands leased thereby appears in full in the Answer of the said The Elk Hill Coal and Iron Company filed in this case. (See Record, volume 1, pages 163 *et seq.*). The said coal lease and contract embraced therein was duly recorded at and about the time of its execution in the Recorder's office in and for the county of Lackawanna, Pennsylvania. That since the date of the entry into possession by The Elk Hill Coal and Iron Company of the lands covered by the above-recited coal lease and contract embraced therein which followed immediately

after the execution of said coal lease and contract, and in accordance with the terms thereof, one-half of the coal mined from the lands embraced in the said coal lease has been delivered to and purchased by the Pennsylvania Coal Company in accordance therewith, and there still remains in the ground a large acreage of the coal covered by the said lease above referred to.

Third.—That neither the said coal lease nor the contract of sale of the coal covered thereby, although in the form of the said 65% contract are in any respect illegal, nor was the said coal lease and contract entered into in violation of the provisions of the Act of July 2, 1890, known as the Sherman Anti-Trust Act, nor was the said contract embraced in this coal lease within the condemnation of the opinion of this Court herein, nor covered thereby, or referred to therein, and this because the coal covered by the contract above recited came from the lands of the Pennsylvania Coal Company embraced in the coal lease, and further because the lessee named therein, to wit, The Elk Hill Coal and Iron Company, really was a contractor undertaking to mine coal from the lands of your petitioner under certain terms, and to deliver and sell the same coal of your petitioner in accordance with the provisions of Article Second of the lease, and said coal lease and contract embraced therein was not made at the time or in the manner or for any of the purposes, or with the intent referred to in the opinion in the above-entitled cause.

That in the opinion herein it is said by this Court that as the result of negotiations between the inde-

pendents and the subsidiary coal companies of the railroad companies a form of contract and a price was mutually agreed upon, being the form of the 65% contracts which were thereafter entered into as the short term agreements theretofore made expired. It is said further "the contracts to be made would be not only for the life of the mines being operated at the date of the sale but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tidewater would be removed forthwith." That it appears by the facts recited in this petition that this particular contract of March 1, 1902, was in no sense within the class of contracts mentioned in the opinion of this Court, did not take the place of a short term contract, and did not tie up to any coal company controlled by any railroad, any coal theretofore free and independent. Further, this particular contract was dissimilar from the so-called 65% contracts adjudged illegal in the opinion of this Court in that it did not purport to cover coal that might thereafter be acquired by The Elk Hill Coal and Iron Company, but was confined simply to certain coal that was to be mined from the leased lands, and referred to none other.

That if by the terms of the decree to be entered herein by the Court below this particular contract embraced in the said coal lease above recited should be adjudged to be illegal and stricken down, great injustice and injury would be inflicted on the parties thereto.

Fourth.—That both the Pennsylvania Coal Company

and The Elk Hill Coal and Iron Company were parties defendant herein. That in the opinion herein it is said by the Court, "The case will be remanded with direction to enter a decree cancelling each of these contracts and perpetually enjoining their further execution and for such proceedings as are in conformity with this opinion." That this order may be understood by the court below to cover the contract embraced in the coal lease between your petitioners and The Elk Hill Coal and Iron Company unless exception is made and your petitioner is in some way protected from such construction and application of this order.

WHEREFORE, your petitioner respectfully prays that the decree to be entered herein shall provide that the Court below may except from the general decree cancelling each of the so-called 65% contracts, the aforesaid mentioned contract embraced in Article Second of the coal lease between your petitioner and The Elk Hill Coal and Iron Company above recited, if it shall find that such contract is not within the condemnation of the opinion of this Court in the above-entitled cause, and is not in violation of the provisions of the Act of July 2, 1890, as construed in such opinion.

PENNSYLVANIA COAL COMPANY,

By David Bowman
Secretary

Geo. F. Brownell
Solicitor.

STATE OF NEW YORK,
City and County of New York, } ss.:

David Boarman, being duly sworn, says that he is an officer, to wit: Secretary of the Pennsylvania Coal Company; that he has read the foregoing petition by him subscribed, and that the statements made by him therein are true, except as to such matters as are stated on information and belief, and as to those he believes them to be true.

Subscribed and sworn to before me this 15th day of January, 1913. } David Boarman

G. L. Jones

Notary Public No. 76 Kings County.
Certificate filed in New York County, No. 12.
My Commission expires March 30, 1913.

Office Supreme Court, U. S.
FILED.
JAN 20 1913
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE READING COMPANY ET AL.,
Appellees.

No. 198 of October Term, 1912.

PETITION OF THE NEW YORK, SUSQUEHANNA AND WESTERN COAL COMPANY.

COLLINS & CORBIN,
Solicitors.

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Appellant, *vs.* THE READING COMPANY, ET AL., Appellees.	No. 198 of October Term, 1912.

TO THE SUPREME COURT OF THE UNITED STATES:

The New York, Susquehanna and Western Coal Company (hereinafter called the Susquehanna Company), respectfully petitions the Court with reference to the decree to be entered in the above-entitled case and alleges:

1. It is a corporation organized under the laws of the State of Pennsylvania and authorized by the laws of said State, and by its charter, to own, hold and lease anthracite coal lands in said State and to ergage in the mining and selling of anthracite coal. That Joseph J. Jermyn is a citizen and resident of the City of Scranton, in the State of Pennsylvania.

2. That in and by an indenture of coal lease bearing date the first day of March, 1887, executed, however, on the 9th day of April of that year, the Susquehanna

Company, being the lawful owner of certain coal lands situate in Lackawanna County, Pennsylvania, which it had owned for some time theretofore, granted and leased to the said Joseph J. Jermyn and his father, John Jermyn, doing business as co-partners under the name of Jermyn & Co., all the coal in and under certain lands embracing a considerable acreage situate in the said County of Lackawanna and State of Pennsylvania (see Govt. Ex., 100, Record, Vol. 3, p. 188). That a part of the consideration for the making of said coal lease, without which it would never have been entered into by the Susquehanna Company, was the contract and agreement made at the same time and as a part of the same transaction by Jermyn & Company, that all the coal to be mined from the leased premises was to be sold and delivered to said Susquehanna Company or such parties as it might designate. Accordingly a contract for the sale delivery of all the coal during the life of the mines was made at the same time the said lease was executed to and with the New York, Susquehanna and Western Railroad Company and to its successors and assigns. Afterwards this contract was duly assigned to the Susquehanna Company. That this contract for the sale and delivery of all the coal from the demised premises provided for payment therefor upon an agreed percentage of the tidewater prices received for the sale of said coal. That in 1894 a modified contract for the sale and delivery of all the coal to be mined from said demised premises was entered into by the said Jermyn & Company and the Susquehanna Company, the only changes therein as compared with the previous contract

being that payment for the coal was to be made upon a different percentage of the tidewater prices received for such coal. That in June, 1901, the said Jermyn & Company and the Susquehanna Company again modified the contract theretofore existing, which was in full force and effect at that time and by its terms was to continue for the life of the colliery and to cover all of the coal to be mined therefrom by which settlements for the coal were to be made upon a still different percentage of the tidewater prices received for such coal, namely: 65% of such tidewater prices, and some minor changes were made as to preparation of the coal but that otherwise the said contract of June, 1901, was a continuation of the previous contracts as to the sale and delivery of the coal from the demised premises and applied only to such coal and contained no provision as to coal coming from lands other than the demised premises that might be acquired by the said Jermyn & Company. In other words, it was confined to the coal to be mined from the leased lands in just the same way as the contract of 1894 had provided, and the contract of 1887 had provided, and amounted to no more than a modification of these two prior contracts with respect to the prices to be paid for the coal to be delivered thereunder and methods of preparation and sizing. The entire transaction as between the Susquehanna Company and Jermyn & Company which covers both the coal lease and the contract for the sale and delivery of the coal to be mined back to the lessor or to such parties as it might designate, in reality amounted to no more than the making of Jermyn

& Company, the contractors for mining Susquehanna Company's own coal preparing it in the breaker on the premises and delivering said coal back to the Susquehanna Company or such parties as it might designate upon such terms and for such prices as appear in the coal lease, and in the contract for the sale and delivery of this coal made at the time the coal lease was made and the modifications thereof in 1894 and 1901, so that the contract of 1901 was not made for the purpose of tying up the coal for the life of the colliery, which theretofore was free and independent and belonged to individuals, but was for the purpose of modifying the previous contracts above referred to and had to do only with the coal of the Susquehanna Company which Jermyn & Company had agreed to mine out and prepare and deliver to it as appears above. That since the date of the first contract made at the time the lease was entered into Jermyn & Company, or Joseph J. Jermyn as the surviving partner thereof, John Jermyn having died in 1902, have delivered and sold to the Susquehanna Company or to parties it has designated, all the coal mined and removed from the leased lands and there still remains a large acreage of coal in the leased land to be mined and removed and to be delivered in accordance with the plain and clear agreement made by and between the Susquehanna Company and Jermyn & Company in 1887.

(3) That, therefore, neither of the contracts above referred to for the sale and delivery of the coal to be

mined and removed from the coal lands of the Susquehanna Company, leased as aforesaid to Jermyn & Company, were or are in any respect illegal, nor was the said contract of June, 1901, within the condemnation of the opinion of this Court herein nor covered thereby or referred to therein, because the coal provided to be sold and delivered in said contract of June, 1901, was coal owned by the said Susquehanna Company and leased out by it to the said Jermyn & Company, the said Jermyn & Company really being contractors undertaking to mine coal from the lands of the Susquehanna Company under certain terms and to deliver and sell the same coal of the Susquehanna Company back to the said Susquehanna Company or to such parties as it might designate, and further, because said coal lease and contract of 1887 and the modification thereof of 1894 and the further modification thereof of June, 1901, were not made in the manner or for any of the purposes or with the intent referred to in the opinion of this Court in the above-entitled case. That if by the terms of the decree to be entered herein the last modification of the contract as to the sale and delivery of the Susquehanna Company's coal back to it, namely, the contract entered into in June, 1901, should be adjudged to be illegal, great injustice and injury would be inflicted on the parties thereto.

(4) That both the Susquehanna Company and Joseph J. Jermyn, as the surviving partner of Jermyn & Company, were party defendants herein. That in the

opinion herein it is said by this Court that as the result of negotiations between the independents and the subsidiary coal companies of the railroad companies a form of contract and a price was mutually agreed upon, being a form of the 65% contracts which were thereafter entered into as the short term agreements theretofore made expired. It is said further "the contracts to be made would be not only for the life of the mines being operated at the date of the sale but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tidewater would be removed forthwith." That it appears by the facts recited in this petition that this particular contract of June, 1901, was in no sense within the class of contracts mentioned in the opinion of this Court, did not take the place of a short term contract, did not tie up to any coal company controlled by any railroad any coal theretofore free and independent but was a modification of a previous contract that covered all the coal to be mined from the lands, owned by the Susquehanna Company under ~~the~~ lease to Jermyn & Company. Further, this particular contract was dissimilar from the so-called 65% contracts adjudged illegal in the opinion of this Court in that it did not purport to cover coal that might thereafter be acquired by Jermyn & Company but was confined to the coal that might be mined from the leased lands, and referred to none other. That in the opinion herein it is stated by this Court: "The case will be remanded with direction to enter a decree cancelling each

of these contracts and perpetually enjoining their further execution and for such proceedings as are in conformity with this opinion." That it is possible the Court below may misapprehend this language and require a cancellation of the said contract between the Susquehanna Company and Jermyn & Company unless exception is made with reference thereto under the facts and circumstances recited in this petition.

WHEREFORE, your petitioner respectfully prays that the decree to be entered herein shall provide that the Court below may except from the general decree, cancelling each of these contracts, the aforesaid mentioned contract between the Susquehanna Company and Jermyn & Company, if it shall find that such contract was not within the condemnation of the opinion of this Court herein, and was not in violation of the provisions of the Act of July 2nd, 1890, as construed in such opinion.

THE NEW YORK, SUSQUEHANNA AND
WESTERN COAL COMPANY,

By J. E. Parker,
Assistant Secretary

Collins & Corbin
Solicitors.

STATE OF NEW YORK,
City and County of New York. } ss. :

J. E. Packer, being duly sworn, says that he is an officer, to wit Assistant Secretary of The New York, Susquehanna and Western Coal Company ; that he has read the foregoing petition by him subscribed, and that the statements made by him therein are true, except as to such matters as are stated on information and belief, and as to those he believes them to be true.

Subscribed and sworn to before me this 18th day of January, 1913. } J. E. Packer

A. J. Travers

Notary Public No. 79 Kings County,
Certificate filed in New York County, No. 52
My Commission Expires March 30, 1914.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 198.

THE UNITED STATES,

Appellant,

v.

READING COMPANY AND OTHERS.

Appellees.

REPLY OF THE UNITED STATES TO THE FIVE SEPARATE PETITIONS OF THE DEFENDANTS PENNSYLVANIA COAL COMPANY, ELK HILL COAL & IRON COMPANY, NEW YORK, SUSQUEHANNA & WESTERN COAL COMPANY, HILLSIDE COAL & IRON COMPANY, AND DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, IN REFERENCE TO THE DECREE TO BE ENTERED HEREIN.

I.

Petitions of Pennsylvania Coal Company and Elk Hill Coal & Iron Company.—The United States would assent to the incorporation in the decree to be entered by this court of a direction that the bill be dismissed, without prejudice, as to the indenture of March 1, 1902, between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company (R., I., p. 163), that agreement being substantially different from the series of agreements, known as 65 per cent contracts, adjudged unlawful by this court.

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II.

Petition of New York, Susquehanna & Western Coal Company.—The contract between New York, Susquehanna & Western Coal Company and John Jermyn and Joseph J. Jermyn, dated November 1, 1900 (R., I., p. 321), assailed in the original petition as in violation of the act of July 2, 1890, was entered into immediately following the framing by the defendants in concert of the form of agreement known as the 65 per cent contract, and has the vices and in all other substantial respects is identical with the series of contracts in that form adjudged unlawful by this court.

The mines embraced in this contract in 1907 produced 353,122 tons of anthracite coal. (R., III, p. 421.)

Most of the capital stock of New York, Susquehanna & Western Coal Company is owned by New York, Susquehanna & Western Railroad Company, whose capital stock in turn is nearly all owned by Erie Railroad Company.

The lease dated March 1, 1887, and the two sales contracts made in 1887 and 1894 between the New York, Susquehanna & Western Coal Company and the Jermyns, referred to in paragraph 2 of the petition of the former, are not in the record and the United States is therefore unable to answer the allegations based on their terms, but avers that in no event are they material.

Therefore the United States opposes the request that the aforesaid contract, dated November 1, 1900, be exempted from the operation of the decree to be entered herein.

III.

Petition of Hillside Coal & Iron Company.—The contract between Hillside Coal & Iron Company and Lackawanna Coal Company, Limited, dated October 21, 1903 (R., I., p. 297), assailed in the original petition, was entered into following the framing by defendants in concert of the form of agreement known as the 65 per cent contract, and has the vices and in all other substantial respects is identical with the series of contracts in that form adjudged unlawful.

Upwards of 60,000 tons of anthracite coal are yearly sold to Hillside Coal & Iron Company under this contract.

The entire capital stock of Hillside Coal & Iron Company is owned by Erie Railroad Company.

The lease dated May 24, 1902, between Hillside Coal & Iron Company and the assignor of Lackawanna Coal Company, Limited, referred to in paragraph 2 of the petition of the former, is not in the record, and the United States is therefore unable to answer the allegations based on its terms, but avers that said lease has not been attacked by the United States, and that in no event are its provisions material in determining the legality under the antitrust act of the contract of October 21, 1903.

The fact that the land from which is mined the coal purchased by the Hillside Company is leased by that company to the Lackawanna Company gives the former no right to control the marketing of the coal by a contract which would be unlawful had there been no such lease.

Therefore the United States opposes the request that the aforesaid contract, dated October 21, 1903, be exempted from the operation of the decree to be entered herein.

IV.

Petition of Delaware, Lackawanna & Western Railroad Company.—The sales contract between Delaware, Lackawanna & Western Railroad Company and Peoples' Coal Company, dated October 26, 1899, assailed in the original petition, while made before the conclusion of the conferences amongst the defendants herein at which the form of 65 per cent contract was agreed upon, was yet made whilst those conferences were in progress, and, as admitted by the petition (p. 2), is "in the form of and substantially on the basis of the so-called 65 per cent contract referred to in the opinion herein."

The lease referred to in paragraph 2 of the petition has not been attacked and is not material in determining the legality of the aforesaid contract of October 26, 1899, under the act of July 2, 1890. The fact that the land from which is mined the coal purchased by the Delaware, Lackawanna & Western Railroad Company under the assailed contract is leased by that

company to the Peoples' Company gives the former no right to control the marketing of coal mined from said land by a contract which would be unlawful had there been no such lease.

In 1907 the output of the mine embraced in the aforesaid contract of October 26, 1899, was 217,956 tons. (R., III, p. 423.)

The sales contract between Delaware, Lackawanna & Western Railroad Company and George F. Lee Coal Company, dated May 1, 1907, assailed in the original petition, was entered into following the framing by the defendants in concert of the form of agreement known as the 65 per cent contract, and contains generally the provisions of that form (see present petition D., L. & W. R. R., p. 2; Ans. Geo. F. Lee Coal Co., R., I., p. 231), and therefore is one of the series of contracts in that form adjudged unlawful by this court.

The mine operated by the said George F. Lee Company is leased only in part from Delaware, Lackawanna & Western Railroad Company. (R., V., p. 913.) Its output in 1907 was 67,281 tons. (R., III, p. 421.)

Therefore the United States opposes the prayer of the petition of Delaware, Lackawanna & Western Railroad Company, that the aforesaid contracts be exempted from the operation of the decree to be entered herein.

V.

We submit that, except as regards the contract dated March 1, 1902, between Pennsylvania Coal Company and Elk Hill Coal & Iron Company, the prayers of the before-mentioned petitions of defendants, in reference to the decree to be entered herein, should not be granted.

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JANUARY 25, 1913.

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